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No.

In the Supreme Court of the United States

Term, 1995

RONALD B. WOLFE,

Petitioners

vs.

ALLEGHENY BEVERAGE CORPORATION
and
PMA INSURANCE COMPANY

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

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1. Under *stare decisis*, res judicata, collateral estoppel, and due process principles of our constitutional system of government, can the highest court in a state decide certain issues *one way* in reviewing an appeal from the Superior and Common Pleas Courts and then *refuse to review* the *identical* issues decided *differently* under the same facts and parties upon review from the Commonwealth Court and Workmen's Compensation Appeal Board?

2. Is it appropriate to require a party to defend the *same* issues in *two* forums with the possibility and, in this case, actuality of *separate* conflicting adjudications, dual sets of appeals and inconsistent *final* decisions?

3. Does our constitutional form of government countenance different economic results depending on the form of settlement—lump sum versus structured—where there is an identity of facts, law and parties?

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PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are those appearing in the caption of the case.

CONSTITUTIONALITY OF STATE OR FEDERAL STATUTE

The instant Petition for Certiorari does not attack the constitutionality of a state or federal statute, but rather attacks the constitutionality of the same case involving the same issues and parties being litigated and reviewed on a dual track with inconsistent final decisions.

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

On February 16, 1995 (App. 1a), the Pennsylvania Supreme Court denied Ronald B. Wolfe's Petition for Allowance of Appeal from the split Pennsylvania Commonwealth Court's En Banc decision and opinion filed August 18, 1994. The Commonwealth Court's Order and Opinion, *Allegheny Beverage Corp. and PMA Insurance Co. v. W.C.A.B. (Wolfe)*, 166 Pa. Commonwealth Ct. 646, 646 A.2d 762 (1994) is attached (App. 2a).

On May 28, 1993, the same Supreme Court in *Pennsylvania Manufacturers Association Insurance Co. v. Wolfe*, 534 Pa. 68, 626 A.2d 522 (1993), decided *identical* issues with the same facts and parties in a completely different way (App. 3a).

With respect to the Workmen's Compensation Appeal Board's and Referee's decisions that led to the Commonwealth Court decision (*see* App. 34a and 44a) and with respect to the Superior Court's and Common Pleas Court's decisions that led to the Supreme Court's Opinion (*see* App. 51a and 69a) should be noted that virtually all of the entities that considered this case decided the issues in a different way.

STATEMENT OF JURISDICTION

The United States Supreme Court is vested with jurisdiction over this matter pursuant to 28 U.S.C. §1257(a) which sets forth the requirements for review by Writ of Certiorari. Also, pursuant to Supreme Court Rule 10.1 and the powers vested by the United States Constitution, the Supreme Court has broad discretion to consider matters which affect a constitutional system of government.

RELEVANT STATUTES AND ORDINANCES INVOLVED

The statute governing a workmen's compensation carrier's right to subrogation in Pennsylvania, Section 319 of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, is found in 77 P.S. §671. The relevant portion states:

> "Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employe, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employe, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation."

CONCISE STATEMENT OF THE CASE

The Pennsylvania Supreme Court's 1993 Opinion summarized the essential facts of this case (App. 21a):

12/19/81 While working, Mr. Wolfe slipped and fell on ice in a parking lot. At the time, he was earning $492.70 per week (approximately *$2,000 per month or $25,000 a year).* He received the *maximum compensation* of $262 per week *($1,135 per month)* which was about *half of his pre-accident income* (App. 79a).

6/25/85 PMA's attorney prepared an escrow agreement (App. 82a) and acknowledged:

(1) A structured settlement offer costing $275,000 (sic $274,000);

(2) $110,000 to be paid "up front";

(3) Angino & Rovner's fee agreement providing for a 40% fee;

(4) PMA's claim for $55,000 based upon 60% of past compensation paid;

(5) Net to Mr. Wolfe of $165,000 (sic $164,000) used to purchase an annuity that provided monthly payments of $1,250 plus balloons at 5 year intervals (*see,* Distribution Sheet, App. 86a and Structured Settlement Agreement, App. 88a).

8 /18 /94 Although all documents, including PMA's escrow agreement, acknowledge a structured settlement *worth $274,000* and attorney's fees of *40% or $110,000,* and although Mr. Wolfe received from June 20, 1985, to September 1, 1994, *only $33,061.01 more than his workmen's compensation payments and PMA has paid nothing*

towards attorney's fees, the Commonwealth Court entered an Order *evaluating* Mr. Wolfe's structured settlement as worth *$450,000* (guaranteed payments), attorney's fees of *24.444%* (based upon $450,000 settlement), and provided that PMA get a grace period and relief from counsel fees for 14 years (to 1999) *plus* 5 years of "excess payments" *plus* Mr. Wolfe's $20,000 1995 balloon payment *totalling $294,795.* All of this from an annuity costing *$164,000. (See,* Commonwealth Court's Opinion, App. 2a).

A timeline or chronology of this case is quite illuminating:

12/19/81 Date of accident

1/13/82 Notice of compensation payable

11/17/83 Negligence complaint

8/2/85 Settlement Agreement—value $274,000

9/20/85 PMA's Complaint in Common Pleas Court

10/21/85 Suspension Petition—Workmen's Compensation Appeal Board

4/28/86 Wolfe's Motion for Judgment on Pleadings

8/22/86 Motion Denied

10/7/86 Referee Deeley's Decision

1/6/87 Hearing—Workmen's Compensation Appeal Board

1/21/88 Dauphin County Opinion

7/11/89 Superior Court Opinion

7/17/90 Workmen's Compensation Appeal Board's Opinion

9/10/90 Records sent to Commonwealth Court

4/25/91 Following briefs and oral argument, a three-judge panel of the Commonwealth Court issued order

"that this case shall be held without decision pending a decision by the Supreme Court ..."

5/28/93 Supreme Court Decision

8/18/94 Without permitting additional briefs or oral argument, Commonwealth Court en banc decided issues contrary to Supreme Court

2/16/95 Supreme Court refuses to hear appeal from Commonwealth Court

Although there was only one incident, the fall on 12/19/81; the same two parties, Wolfe and Pennsylvania Manufacturers Association (PMA); and the same issues of priority (attorney versus carrier) and lien calculation in a structured settlement context, ten years of litigation resulted in totally inconsistent opinions from the Pennsylvania Supreme and Commonwealth Courts.

The Commonwealth Court's opinion is not self-executing and, consequently, in addition to the inconsistent holdings in the Supreme Court (App. 21a) and the Commonwealth Court's opinions (App. 2a) there is a dilemma for the structured settlement annuity carrier to respond to its contractual duties. The difference in results based arbitrarily upon the type of settlement—lump sum versus structure—has cast a sudden chill on the structured settlement avenues being pursued in state and national tort reform.

REASONS FOR THE ALLOWANCE OF THE WRIT

A. Principle Of *Stare Decisis* (Also, Res Judicata, Collateral Estoppel)

Your Court has time and time again recognized that the doctrine of *stare decisis* is of "fundamental importance to the Rule of Law." *See, e.g., Hilton v. South Carolina Public Railways Commission*, 112 S.Ct. 560 (1991); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987); *see also, Patterson v. McLean Credit Union*, 491 U.S. 164 (1982); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (Brandeis, J., dissenting). Adherence to the principle of *stare decisis* and precedent promotes "stability, predictability, and respect for judicial authority."

Hilton, supra at 564; *Vasquez v. Hillery*, 474 U.S. 254 (1986).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992), Your Court stated:

> "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16."

Id. at 2808.

Since this case involves *identical* parties, *identical* facts and *identical* issues, not only does *stare decisis* apply, but also res judicata and collateral estoppel. Mr. Wolfe has been required simultaneously to defend his position through a dual litigation and review process. Mr. Wolfe has been through the equivalent of a civil "double jeopardy." He felt he had won when the Supreme Court had decided in his favor (App. 21a) only to have the Pennsylvania Commonwealth Court en banc come down with a different decision without the benefit of post-Supreme Court briefing and any oral argument whatsoever (App. 2a).

It is clear that Mr. Wolfe's fundamental due process rights have been violated.

B. The Commonwealth Court's Holdings Are Contrary To The Supreme Court's Opinion And Holdings Dealing With The Same Issues

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Putting the Supreme Court's decision of May 28, 1993, side by side with the Commonwealth Court's Opinion of August 18, 1994, is a study in contrast:

Supreme Court

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1. Opinion 534 Pa. at 73, 626 A.2d at 524, footnote 2, recognized the obligation of PMA and the client to pay a *40%* attorney's fee and that the *$110,000* constituted *40% of the present cash value of the settlement (i.e., $274,000)* (App. 21a).

2. "In determining whether or not an injured employee is entitled, or has a 'right,' or does receive any payment from a third party, one must first deduct reasonable attorney's fees and expenses incurred in obtaining a recovery or in effecting

a compromise settlement in the first place." *Id.* at 74, 626 A.2d at 525.

Mr. Wolfe did not receive any monies whatsoever *until he received his first check for $1,250* and continued to receive monthly checks of $1,250 until 1990 when he received a $10,000 balloon payment.

3. The Pennsylvania Supreme Court recognized that, if the accident had happened as Mr. Wolfe was getting into or out of his truck, there would not have been a lien under the then-existing PA Motor Vehicle Insurance Act. PMA would have gotten nothing for past compensation and would be required to pay future compensation at the same rate.

"In the few remaining areas where worker's compensation subrogation continues, the system does at least provide some equity and fairness by requiring that both the carrier and the injured victim share the costs of the attorney who creates the fund. *It leaves the victim and his attorney in control as to when a case is settled or tried and as to the type of settlement entered into. The carrier benefits* from the whole third-party settlement by a combination of initial reimbursement *and/or* subsequent suspension of payments, *until such time as they equal the value of the net settlement.* The client is charged a fee on the *value* of the entire third-party settlement, and *the carrier,* which takes advantage of the whole fund, *must pay a proportionate share for this enlarged—and very valuable—benefit. Both carrier and employee receive something less than full reimbursement because each must pay toward the incurred attorney's fees and costs which under our system are not recoverable from the third party tortfeasor." Id.* at 75, 626 A.2d at 525-526. (Emphasis supplied.)

4. "Subrogation is an equitable principle and the subrogee carrier can have no greater rights than the subrogor employee. The subrogor employee entered into a contingent

fee agreement to pay a 40% fee. PMA cannot expect to receive money before the injured employee has the right to receive money and cannot expect to receive money without first paying his contractual obligation incurred in return for the attorney's work in creating the fund." *Id.* at 76, 626 A.2d at 526.

5. "The worker's compensation law cannot be applied in such a manner as to place the injured employee in a position of receiving less monthly benefits after a settlement than he was receiving in worker's compensation payments. ... The carrier's position would have a chilling effect upon such settlements to the detriment of all concerned except the third party tortfeasor." *Id.* at 76, 77, 626 A.2d at 526.

6. "The panel's decision in this case is in conflict with another panel's decision in *Johnson v. Sears, Roebuck & Company* and leaves attorneys with no guidance on how to calculate a contingency fee on a structured settlement. In *Johnson v. Sears, Roebuck & Co.*, 291 Pa.Superior Ct. 625, 436 A.2d 675 (1981), a panel of the Superior Court held:

'The Johnsons urge us to find that the most equitable method of determining the amount due their former attorneys is to award them one-third of the lump sum payments plus one-third of any periodic payment if and when received.... Considering the nature of annuity settlements and the fact that they may be paid out over an extensive period of time, we believe this method of payment can be both unwieldy and impractical.' " *Id.* at 77, 626 A.2d at 526-527.

7. The Supreme Court in footnote 4 states:

"Our resolution will provide full payment to the attorneys in satisfaction of their contingency fee agreement, *the injured party will continue to receive the sum of $1,250.00* per month from the structured settlement, and the worker's compensation carrier will suspend its obligation to pay the injured

worker *the sum of $1,135.33 per month until its subrogation rights are satisfied.*" *Id.* at 77, 626 A.2d at 527, fn. 4. (Emphasis supplied.)

8. Although there were dissents to the Supreme Court's 1993 decision, they were not based on contract interpretation.

"FLAHERTY, Justice, dissenting.

While the majority's *contractual* analysis is sound ... ."

Id. at 78, 626 A.2d at 527. (Emphasis supplied.)

Commonwealth Court

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1. The Commonwealth Court values the settlement at *$450,000*, the guaranteed monies available for recovery and, therefore, calculates the attorney's fee as being 24.4444% contrary to *Johnson v. Sears, Roebuck & Co.*, 291 Pa. Superior Ct. 625, 436 A.2d 675 (1981)

2. The Commonwealth Court attempts in its Opinion to get PMA *$93,683* of past compensation paid from Mr. Wolfe without considering the fact that, by its own account, Mr. Wolfe received only *$33,061.01* in addition to his monthly workers' compensation payments from June 20, 1985, to September 1, 1994 (App. 9a-10a).

As to that $33,061.01, PMA certainly has a claim to 60% of same ($19,836) but it must at the same time pay to Mr. Wolfe 40% of the $1,250 per month for 112 months or $56,000. On balance, Mr. Wolfe is entitled to $36,163 plus interest.

3. The Commonwealth Court's Opinion does not agree that the victim and his attorney have control as to the type of settlement, nor does it agree that each side gets less, or that PMA cannot get anything until Wolfe actually gets something more than his compensation payments and, finally, that the compensation carrier must contribute toward its share of the

attorney's fees at the same rate contractually agreed to and paid by the client.

4. The Commonwealth Court's Opinion improperly values the structure at $450,000 and calculates the attorney's fee at 24.4444% and certainly does not do equity to Mr. Wolfe by giving him absolutely no benefit from the third party settlement and giving all of the benefit to PMA. PMA gets not only all of the $33,061.01 excess obtained by the third party settlement but also the 1995 $20,000 balloon payment, plus the relief from making any attorney's fee payment until 1999. Even after that, PMA need only pay for its share of attorney's fees at a 24.4444% rate. PMA gets an extended grace period based upon $450,000 that would extend beyond Mr. Wolfe's life expectancy.

5. If the Commonwealth Court's Opinion is upheld, there will be *no* settlements, structured or lump, *in difficult liability cases*. Injured employees would be much better off in taking their chances with jurors than entering into settlements where the only one to profit is the worker's compensation carrier.

6. The Commonwealth Court would have us return to calculating settlements and attorney's fees not on the basis of cost or cash value but rather on the payment over a period of years, i.e., the approach criticized by *Johnson, supra*.

7. The Commonwealth Court has ordered that Mr. Wolfe's payments would *not* continue at $1,250 per month but rather he must pay to PMA the difference between $1,250 and $1,135.33 and must in addition forego his $20,000 balloon payment and in addition, not ever receive the 40% portion of the suspended compensation and only 24.4444% starting in June of 1999.

8. If the Supreme Court's contractual analysis is sound, the Commonwealth Court's analysis is *obviously in error*.

C. The Commonwealth Court's Opinion Evaluates A Structured Settlement On The Basis Of Total *Guaranteed* Payments Which Is Contrary To All Case Law And Practice In Pennsylvania Since 1981, *Johnson v. Sears, Roebuck & Co.*, 291 Pa. Superior Ct. 625, 436 A.2d 675 (1981); Contrary To Logic And Common Sense; And Contrary To Due Process And Fair Dealing (Arbitrary And Capricious)

PMA admits in its escrow agreement and all of the settlement and distribution documents confirm that the *cost* of the annuity in this case was *$164,000*. The Commonwealth ignores this undisputed fact and uses "the *minimum guaranteed* pay out for our calculations," (App.11a), i.e., *$450,000* ($1,250 a month for 20 years ($300,000) and balloon payments of $10,000 (1990), $20,000 (1995), $30,000 (2000), $40,000 (2005), $50,000 (2010) to calculate value. As a result, attorney's fees are calculated as 24.4444%, and the grace period is tripled in length *(from 8 years to more than 30 years)*.

Presumably, if there were only one guaranteed payment of $450,000 in the year 2020, the attorney's fee percentage would be the same; if the guaranteed payments totalled only $110,000, the attorney's fees would be 100%; and if there were no guarantee, there would be no grace period.

This certainly does not make any sense; $164,000 could be structured to produce no guaranteed payments or guaranteed payments totalling $1,000,000. A grace period based upon "guaranteed payments" does not distinguish between $164,000 received one year later or 30 years later, whether paid monthly for 30 years or in a lump sum 30 years later. It also does not appropriately account for annuities costing $164,000 with no guarantees, guarantees of 10 years, 20 years, 30 years, etc.

Incredibly, by focusing on "guaranteed payments", the Commonwealth Court failed to consider the attorney's fees that were paid "up front" which obviously are a part of the settlement. Adding $110,000 to $450,000 results in a total settlement of $560,000 and attorney's fees proportionately reduced to less than 20%. PMA, which has strenuously argued for ten years that it should have had a priority to the "up front" $110,000 on the basis that money received at the outset is worth substantially more than money received ten, twenty or thirty years later, has not had to pay a single penny towards attorney's fees and expenses for the past ten years.

If the Commonwealth Court's Opinion is upheld, a 40% fee paid by Wolfe in 1985 can be credited to Wolfe in the next millennium at either the 24.4444% ordered by the Commonwealth Court or the less than 20% based upon the total settlement.

For all of these reasons, the Superior Court in *Johnson*, which was *approvingly* cited by the *Pennsylvania Supreme Court in this very same case, has been overruled by the Commonwealth Court without any mention or comment.* Legislatures in Pennsylvania, other states and the federal government which are considering structured settlements as a part of tort reform must reconsider if the Commonwealth Court's analysis is upheld.

D. The Commonwealth Court Opinion Is Inaccurate And Illogical On Its Face And Treats Identical Individuals Arbitrarily Differently Based Upon Whether They Settle For A Lump Sum Or A Structure

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Had Mr. Wolfe settled his case in August of 1985 for a lump sum of $274,000 rather than as a structured settlement, his attorneys would still have received their $110,000 plus

expenses. PMA would have received its lien for past medical and earnings of $55,000. Mr. Wolfe would have been able to invest his $110,000 and, in 1985, probably would have received ten percent per year by way of an annuity or a long-term investment. He, therefore, would have received, *without touching principal,* $11,000 a year or *$916.67 a month.* PMA would have received no credit *for the interest earned.* Mr. Wolfe, in addition, would receive 40% of $1,135 per month ($454 per month) from PMA as its portion of the attorney's fees or a total of *$1,370.67* per month. After *420* weeks, PMA would have to start paying *the full $1,135* (July 18, 1993) that it was paying prior to August of 1985.

Since July 18, 1993, Mr. Wolfe would have been getting $916.67 in interest plus $1,135 from PMA, or a total of $2,051.67 per month (approximately his 1981 earnings). He would also still have the $110,000 of principal invested in an annuity or similar type of long-term investment. PMA's total reimbursement would amount to *$165,000;* $55,000 in cash for past compensation and $110,000 grace period.

By opting to take a structured settlement, Mr. Wolfe has been in continuous litigation for ten years with dual proceedings dealing with the same issues but going through different reviewing bodies. PMA has not been required to pay either the $1,135 per month it previously had to pay or the 40% attributable to its responsibility for attorney's fees. Mr. Wolfe has only received $1,250 per month rather than the $1,635 anticipated ($1,135 plus 40% towards attorney's fees and expenses). In addition, if the Commonwealth Court's Opinion is upheld, for the next five years up until 1999, Mr. Wolfe will receive exactly what he would have received *had there never been a settlement,* i.e., $1,135 per month and forfeit his 1995 balloon payment ($20,000). PMA will get its $93,682.81 back less 24.4444% for attorney's fees and only have to pay 24.4444% toward counsel fees after 1999. PMA also will have

a grace period based upon a $560,000 gross ($450,000 net settlement) rather than $274,000 gross ($164,000 net), which means it will presumably *never have to resume payments to Mr. Wolfe (more than thirty years to 2015, rather than eight years to 1993).*

In this day and age when, on both the federal and state level, tort reform anticipates more structured settlements rather than less, this case would certainly send a freezing chill throughout the Commonwealth of Pennsylvania and throughout the country. Fundamental due process is clearly violated because an individual who settles *on a lump sum basis* for *exactly the same amount of money* invested in a structured settlement, in reality receives *substantially more* and the workmen's compensation carrier *substantially less.* The Commonwealth Court gives PMA the benefit of interest in a structured settlement case when a compensation carrier never gets the benefit of interest in a lump sum settlement. It also bases the value of the structure on the guaranteed payments which is totally arbitrary and capricious. The structured settlement initiative for settling cases will be gone and, since the only benefactor will be the workers' compensation carriers, plaintiffs and their attorneys will have no basis for pursuing out-of-court settlements.

CONCLUSION

Although Your Court seldom gets involved in state court proceedings such as this one, the clear violations of constitutional rights, the current popularity of structured settlements in tort reform, the arbitrary and capricious actions that took place in this case, the devastating injustice perpetuated on one individual and the blatant violations of *stare decisis*, res judicata, and collateral estoppel, cry out for Your review.

Respectfully submitted,
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APPENDIX:

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Notice of Compensation Payable, dated January 13, 1982, Ronald B. Wolfe, Injured Employe, Allegheny Beverage Corp., Employer, PMA Insurance Co., 031-3, Employer/Insurer . . . 79a

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 444 M.D. Alloc. Dkt. 1994

Petition for Allowance of Appeal from Order of Commonwealth Ct.

WORKMEN'S COMPENSATION APPEAL BOARD and RONALD B. WOLFE,

Petitioners

v.

ALLEGHENY BEVERAGE CORPORATION and PMA INSURANCE COMPANY,

Respondents

ORDER

PER CURIAM

AND NOW, this 16th day of February, 1995, the Petition for Allowance of Appeal is denied.

Mr. Justice Montemuro is sitting by designation.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1688 C.D. 1990

ALLEGHENY BEVERAGE CORPORATION and PMA INSURANCE COMPANY,

Petitioners

v.

WORKMEN'S COMPENSATION APPEAL BOARD (WOLFE),

Respondent

SUBMITTED: June 8, 1994

BEFORE: HONORABLE DAVID W. CRAIG, President Judge; HONORABLE JOSEPH T. DOYLE, Judge; HONORABLE BERNARD L. McGINLEY, Judge; HONORABLE DAN PELLEGRINI, Judge; HONORABLE ROCHELLE S. FRIEDMAN, Judge; HONORABLE JAMES R. KELLEY, Judge; HONORABLE SANDRA SCHULTZ NEWMAN, Judge;

OPINION BY JUDGE KELLEY FILED: August 18, 1994

Before the court is an appeal by Allegheny Beverage Corporation (employer), and employer's workers' compensation carrier, Pennsylvania Manufacturers' Association Insurance Company (PMA), from an order of the Workmen's Compensation Appeal Board.[1] The issue in this case involves the proper allocation of a third party structured settlement in order to satisfy employer's subrogation lien for past compensation paid where there is no money available at the time of

[1] This case was originally argued before a three judge panel in April of 1991, and subsequently submitted on briefs to an en banc panel of this court on June 8, 1994.

settlement for this purpose, and a determination of employer's credits and liabilities for the future.

I. Traditional Subrogation

The disposition of this appeal requires the proper application of the reimbursement for past compensations and allocations of attorney's fees as required by section 319 of the Workers' Compensation Act (Act)[2] to the structured settlement recoveries from the third party settlement. The pertinent language of section 319 is:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; *reasonable attorney's fees* and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement *shall be prorated between the employer and employe*, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable *at the time of recovery* or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employe, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future instalments of compensation. (Emphasis added.)

[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §671.

This section specifically requires the employer and claimant to share pro rata the attorney's fees and costs involved to establish the recovery in the third-party claim.

In a "traditional" subrogation case, where the claimant receives a lump sum settlement from a third party, to comply with section 319, the claimant must first reimburse employer for past compensation paid to satisfy the employer's subrogation lien. The amount of the lien for past compensation paid is reduced proportionately by the attorney's fees and costs incurred in obtaining the settlement.

For example, assume that an employer has already paid past compensation of $50,000 at the time that the claimant receives a third party settlement of $150,000, and that the claimant pays his attorney 40% of the settlement or $60,000. The employer is entitled to an immediate reimbursement of $50,000 for past compensation paid, reduced by the proportionate share of attorney's fees or $20,000 (40% of $50,000). Therefore, claimant must pay $30,000 to satisfy his reimbursement to the employer for past compensation paid. This leaves $100,000 as a credit against future compensation. (Note that the $20,000 reduction benefits claimant as the employer's sharing of its proportion of attorney's fees with respect to the subrogation lien, since claimant already paid the entire attorney's fee upon obtaining the third party settlement or judgment.)

The next step is to calculate a grace period based on the remaining settlement money during which employer's responsibility for making weekly benefit payments is suspended. We do this by simply dividing the amount of the settlement money remaining by the weekly rate of compensation. In our example, assuming a weekly rate of compensation of $200, we divide $100,000 by $200 to obtain a grace period of 500 weeks. At the end of 500 weeks, assuming claimant's condition has not

changed, employer's responsibility for making weekly compensation payments will resume.

Although employer's responsibility for paying weekly benefits during the grace period is suspended, in order to comply with section 319 the employer must pay its pro rata share of attorney's fees for the compensation suspended as it benefits from the settlement. The most equitable way to do this is to have the employer pay its proportionate share of attorney's fees each time it receives a credit. Therefore, in our example the employer would pay 40% of $200, or $80, each week during the 500 week grace period. This way if the employer's responsibility for making payments should end during the grace period because of the claimant's death or the end of his disability, then the employer will already have paid its pro rata share of the attorney's fees with respect to the amount of benefit which it has received.

An illustration of the traditional subrogation method can be found in *Pendleton v. Workmen's Compensation Appeal Board (Congoleum Corp.)*, 155 Pa. Commonwealth Ct. 440, 625 A.2d 187 (1993). The calculations in *Pendleton* are performed in a slightly different manner but yield the same result. In *Pendleton*, the subrogation lien is divided by the gross recovery to give the percentage of the gross attorney's fees which should be deducted from the subrogation lien. The grace period is computed in the same manner. The rest of the attorney's fees not attributable to the subrogation lien are then divided by the grace period to give the weekly payment which employer must make for its pro rata share of the fees.

We will examine why the traditional subrogation method would be inappropriate to apply in the present case after reviewing the facts of this case.

II. Factual History

Ronald B. Wolfe (claimant) suffered a work-related injury on December 19, 1981, when he slipped and fell in an icy parking lot while making a delivery for employer. Claimant sustained a serious injury to his left knee and received workers' compensation benefits of $262.00 per week from PMA pursuant to a notice of compensation payable.[3]

In November of 1983, claimant filed a third party complaint in trespass against Weis Markets (Weis), the owner of the property on which he had been injured. After negotiations, claimant and Weis agreed to a structured settlement under which claimant would receive payments over a number of years rather than in one lump sum. The details of the settlement are as follows:

Up-front payment	$110,000
Monthly payments of $1,250 for life with 20 years guaranteed	$300,000 guaranteed
Balloon payments:	
May 20, 1990 - $10,000	
May 20, 1995 - $20,000	
May 20, 2000 - $30,000	
May 20, 2005 - $40,000	
May 20, 2010 - $50,000	$150,000 guaranteed

The settlement agreement provided that the $110,000 up-front payment would be paid to claimant's attorney as full payment for attorney's fees. PMA objected to the settlement contending that the initial $110,000 should not be designated as attorney's fees but rather should be used to reimburse PMA

[3] For later discussion, we note that $262.00 per week is equivalent to $1,135.33 per month; $262.00 x 52 = $13,624 ÷ 12 = $1,135.33.

for past compensation paid. Weis refused to execute the settlement unless PMA agreed to it because Weis feared that it would be subject to future legal action if PMA was not satisfied with the settlement. In the meantime, PMA had filed a civil action in the Court of Common Pleas of Dauphin County alleging entitlement to recovery of the entire amount of their subrogation lien from the initial $110,000 payment. Claimant's attorney and PMA ultimately agreed to escrow at interest $55,000 of the initial $110,000 payment, pending resolution of the civil action. PMA then removed its objection and the settlement was executed. Under the settlement Weis has paid to claimant $1,250 per month from June 20, 1985.

Thereafter, PMA filed a petition to suspend benefits and requested a supersedeas. On February 18, 1986, a referee granted a supersedeas to suspend weekly payments of compensation. Between the time of the injury and the date supersedeas was granted, PMA paid to claimant $56,666.86 in weekly benefits and $37,015.95 in medical bill reimbursements for a total accrued lien for past compensation paid of $93,682.81 against any tort recovery.

In October of 1986, the referee issued a decision in which he continued the suspension of employer's duty to provide weekly compensation benefits. The referee ordered employer to pay $115.38[4] per week as its proportionate share of attorney's fees until claimant is reimbursed in the amount of $110,000. The referee also awarded employer a "credit" in the amount of $26.46 per week to be applied against its subroga-

[4] This figure is 40% of $288.46, which is the weekly amount received by claimant under the settlement agreement: $1,250 x 12 = $15,000 ÷ 52 = $288.46. The 40% factor comes from claimant's attorney's assertion that the present value of the settlement is $274,000. The amount designated for attorney's fees, $110,000 is approximately 40% of $274,000. Claimant did not present any expert testimony to support this present value.

tion lien,[5] and gave employer the right to attach future lump sum payments until its total lien had been satisfied.

Both parties appealed to the board which reversed in part and affirmed in part. The board reversed the referee's grant to employer of a weekly credit of $26.46. The board concluded that claimant's attorney was entitled to the entire $110,000 initial payment and that employer must reimburse claimant for the total amount of attorney's fees. The board ordered that the accrued lien be reduced by deduction of 40% for attorney's fees ($37,473.12), leaving a net accrued lien of $56,209.69. The board directed that this amount be paid only from the future lump sum balloon payments. Because the board had accounted for the $37,473.12 attorney's fees relating to the accrued lien, it directed employer to make payments of $104.80 per week (40% of the compensation rate of $262.00) until the balance of the $110,000.00 overall attorney's fee, or $72,527.00, was paid to claimant. Employer and PMA filed the present appeal from the board's decision.

Meanwhile, in the civil action in the Court of Common Pleas of Dauphin County, both PMA and claimant filed motions for summary judgment. The trial court granted PMA's motion and held that statutorily, PMA's subrogation lien had priority over claimant's attorney's claim for legal fees. *Pennsylvania Manufacturers' Association Insurance Co. v. Wolfe*, 46 D. & C. 3d 594 (1988). However, the trial court ruled that by entering into the escrow agreement, PMA waived its right to the monies not included in escrow. Therefore, PMA's priority

[5] The weekly settlement payment of $288.46 is $26.46 greater than the weekly rate of compensation of $262.00. Presumably, by using the term "credit" the referee meant that the $115.38 weekly payment was to be reduced by $26.46 until the lien was satisfied, although the decision is not explicit in this regard. It would make little sense to give employer a credit in the traditional sense of the word and as used in subrogation cases because the money to satisfy the subrogation lien must be actually reimbursed to employer.

right extended only to the $55,000 included in the escrow account. *Id.*

The Superior Court affirmed the trial court, *Pennsylvania Manufacturers' Association Insurance Co. v. Wolfe,* 386 Pa. Superior Ct. 333, 563 A.2d 94 (1989), and the Supreme Court granted allocatur. *Wolfe v. Pennsylvania Manufacturers' Association Insurance Co.*, 524 Pa. 622, 571 A.2d 384 (1990). Because the appeal before this court involved the same parties and the issue of entitlement to the initial $110,000 payment, we ordered in April of 1991 that the decision here be held pending a determination by the Supreme Court on the merits of the civil action.

On May 28, 1993, the Supreme Court reversed the Superior Court's decision and held that claimant's attorney was entitled to the entire $110,000 initial payment. *Pennsylvania Manufacturers' Association Insurance Co. v. Wolfe,* Pa. , 626 A.2d 522 (1993). With the Supreme Court's decision, we may now address the appeal of the board's order.

III. Current Status

Before discussing how the settlement should be allocated, we will review the current status of the case using an arbitrary date of September 1, 1994 as a reference point for our calculations:

The amount employer paid to claimant for past compensations and medical bills from 12/27/81 to suspension in February, 1986. 93,682.81

From 6/20/85 to 2/18/86 (9 months) the claimant enjoyed double benefits from the structured payment of $1,250.00 and the compensation paid of $1,135.33. The $1,250.00 was excess benefit to claimant. 9 x $1, 250 = $11,250.00

Since 2/18/86 to 9/1/94, claimant has benefited monthly by the difference of $1,250.00 and suspended compensation of $1,135.33 or	$114.67 x 103 months =	$11,811.01
Additionally the claimant received a balloon payment of $10,000 in May of 1990.		$10,000.00
Total excess benefits received by claimant as of 9/1/94.		$33,061.01

Thus the inequity between the claimant and employer has intensified during the past 8 plus years. The law is clear that the reimbursement for past compensations paid is to be immediate.[6] The claimant's attorney made no provision to escrow the $32,258.32 excess receipts claimant has received since May 8, 1985. Such excesses if uncertain of their allocation, should at least have been preserved by escrowing, as was the disputed attorney's fee for the $55,000. Such inconsistent treatment of favoring the attorney's personal interest while totally failing to preserve the excess recovery is at the very least unprofessional.

IV. Ratio

Initially, we wish to note three factors about the current case which make it difficult or impossible to apply the traditional subrogation analysis. First, the concept of a grace period does not apply, because claimant will be receiving monthly settlement payments for the rest of his life which are greater than the workers' compensation benefits he would have received. Barring unforeseen circumstances, employer will therefore never be responsible for paying compensation benefits again.

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[6] *Rollins Outdoor Advertising v. Workmen's Compensation Appeal Board*, 506 Pa. 592, 487 A.2d 794 (1985).

The second factor, a corollary to the first, is that employer will never receive the benefit of the full settlement, because claimant will always receive more from the settlement than he would have received in compensation benefits. It was therefore error for the board and the referee to order employer to pay the full $110,000 of attorney's fees because employer will never obtain credits equal to the full settlement.

The third factor, which leads into our discussion of the ratio to be used to calculate employer's responsibility for attorney's fees, is that we will not know the full value of the settlement until the time of claimant's death because he is guaranteed the monthly payments for life. We therefore have little choice but to use the minimum guaranteed payout for our calculations.

The first step we must take is to calculate a ratio to be used in determining employer's pro rata share of attorney's fees for the credits it receives and for the reimbursement for its subrogation lien. To properly allocate the attorney's fees between the employer and the claimant, the $110,000 attorney's fee must be allocated between them over the guaranteed moneys available for recovery, or $450,000.[7] Thus we must divide $110,000 (the attorney's fee and costs) by $450,000 (the guaranteed recovery) to establish the ratio.

This is algebraically stated:

$$\$110{,}000 \div \$450{,}000 = .244444 \text{ or } 24.4444\%$$

This factor will properly allocate the attorney's fees between employer and claimant as the recovery is allocated between them for reimbursements of benefits paid and or suspended.

[7] This figure represents the total of the guaranteed monthly payments or $300,000, plus the total of the balloon payments or $150,000. Although the structured settlement payments total $560,000, the initial $110,000 attorney fee is excluded because none of $110,000 is available for subrogation recovery under the Supreme Court decision in *Wolfe*.

Claimant argues that we should consider the present value of the settlement at the time of settlement in order to compute the proper ratio, and that we should therefore use a ratio of 40%.[8] We do not do so for four reasons. First, claimant's attorney has waived the right to a percentage of the settlement by accepting a lump sum fee. Second, there is no expert evidence of record which would support the present value which claimant asserts.

Third, we do not normally use present and future values in a traditional subrogation case because of the difficulties involved in making such calculations, even though such calculations are warranted. In a traditional subrogation case we calculate the grace period by simply dividing the gross settlement money left over after reimbursement of the subrogation lien by the weekly rate of compensation, even though that gross recovery has a future value much greater than its present value. In other words, if we purchased an annuity with that money or simply put it in an interest bearing account and withdrew a weekly amount equal to the compensation rate, the weekly payments would last much longer than the grace period which we have calculated due to the interest which that money is earning. We see no reason to consider present and future values in our calculations in the present case when we do not normally do so.

Fourth, under the facts of the present case, employer will not receive reimbursement for its subrogation lien until many years after the settlement, whereas in a traditional subrogation case the lien would be reimbursed in full at the time of the settlement. We will make no adjustments for present and future value with respect to the subrogation lien, *i.e.*, we will not require claimant to pay any interest on the money owed to employer, and it would be unfair to employer to require

[8] See footnote 4.

employer to in effect pay interest on the attorney's fees owed to claimant when we do not require claimant to pay interest on the money owed to employer. This is the most equitable and simplest way of dealing with the unique facts of this case.

V. Reimbursement and Credits

Once the proper ratio for the recovery of attorney's fees is determined, the allocation of this fee may be calculated to reflect how the claimant and employer each benefit from the third party recovery. Having established a ratio of 24.4444%, we will apply that percentage to our subrogation and reimbursement calculations.

The first consideration must be given to the obligations of the claimant to reimburse the employer for the past compensations and medical expenses paid.

The amount paid by employer to and on behalf of claimant until suspended on February 20, 1986 was	$93,682.81
In order for the employer to share the attorney fee and cost, the amount should be debited by his benefiting from the recovery. Thus the amount should be reduced by the 24.4444% or	$22,900.20
Thus, the net balance claimant owes the employer for past paid compensation and medical is	$70,782.61

The recoveries generate several sources for credits and payments for which to "pay" the net due to the employer by the claimant for the subrogation lien. These sources are (1) the excess of the monthly settlement payments over the monthly compensation rate, (2) the balloon payments, and (3) credits for the weekly pro rata share of the attorney's fees which employer should be paying to claimant. On a continuing

monthly basis, the employer has owed the claimant the attorney fee allocation of the suspended compensation.

This monthly calculation is the suspended compensation of $1,135.33
multiplied by the factor of 24.4444%
equals the monthly debiting of the amount owed $ 277.52
multiplied by the 103 months from February, 1986 to September, 1994
$277.52 x 103 = $28,584.56
what the employer owed the claimant $28,584.56

leaving a balance due to the employer from claimant as of September 1, 1994 in the amount of $70,782.61 - $28,584.56 = $42,198.05

On a monthly basis the claimant should pay to the employer the monthly excess that the claimant receives, as a difference between the recovery and the suspended compensation of $1,250.00
$1,135.33
resulting in $ 114.67

added together with employer's allocation of attorney fees of $277.52 = $ 392.19

the combined monthly reduction would continue until the next balloon payment due May, 1985, eight months equalling (8 x 392.19) $ 3,137.52

leaving the balance due to the employer by the claimant before the balloon payment of May 20, 1995 of $39,060.53

the entire balloon payment of $20,000 must then be paid to employer by claimant and credited	$20,000.00
the balance due employer from claimant on May 20, 1995, after the balloon payment is	$19,060.53

Thereafter, the obligation should, as a monthly continuing basis credited by the $392.19 being the debit of the $277.52, and the $114.67 excesses to be paid by the claimant to the employer equals a requirement of 48.6 months:

$19,060.53 $392.19 = 48.6

Thus: the 48th month from May, 1995 to May, 1999 ($392.19 x 48)	$18,825.12
leaving a balance due on June 20, 1999 of	$ 235.41

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1688 C.D. 1990

ALLEGHENY BEVERAGE CORPORATION and PMA INSURANCE COMPANY,

Petitioners

v.

WORKMEN'S COMPENSATION APPEAL BOARD (WOLFE),

Respondent

ORDER

NOW, this 18th day of August, 1994, the order of the Workmen's Compensation Appeal Board, dated July 17, 1990, at No. A-92466, is vacated and the matter is remanded for proceedings consistent with the attached opinion.

Jurisdiction relinquished.

/s/ James R. Kelley
JAMES R. KELLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1688 C.D. 1990
SUBMITTED: June 8, 1994

ALLEGHENY BEVERAGE CORPORATION and PMA INSURANCE COMPANY,

Petitioners

v.

WORKMEN'S COMPENSATION APPEAL BOARD (WOLFE),

Respondent

BEFORE: HONORABLE DAVID W. CRAIG, President Judge; HONORABLE JOSEPH T. DOYLE, Judge; HONORABLE BERNARD L. McGINLEY, Judge; HONORABLE DAN PELLEGRINI, Judge; HONORABLE ROCHELLE S. FRIEDMAN, Judge; HONORABLE JAMES R. KELLEY, Judge; HONORABLE SANDRA SCHULTZ NEWMAN, Judge

DISSENTING OPINION
BY JUDGE McGINLEY FILED: August 18, 1994

I respectfully dissent. Initially, I believe the majority incorrectly calculates the ratio used to determine employer's pro rata share of attorney's fees for credits and for reimbursement in connection with the subrogation lien. Under section 319 of The Pennsylvania Workmen's Compensation Act (Act),[1] the employer is subrogated to the full recovery but must pay attorney's fees on any recovery that is actually realized. Accordingly, attorney's fees must be allocated between claimant and employer based on the entire settlement regardless of who the

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §671.

initial payment goes to. The calculation of the attorney's fee rate, then, should be $110,000/$560,0000 = .1964 or 19.64%.

However, $560,000 is not the appropriate figure for this calculation because the claimant did not receive a lump sum at the time of settlement. Through the settlement claimant secured the right to receive payments of varying amounts with a minimum guaranteed total of $560,000 over twenty-five years. There is no dispute that the right to receive payments of varying amounts totalling $560,000 twenty-five years from now is worth far less than the right to receive $560,000 presently. All of the parties recognized this (including employer's insurer in the escrow agreement) and expressly agreed that the net present value of the structured payments at the time of settlement was $275,000. This is further reflected in the attorney's fees. Because of the open-ended settlement structure, there was no lump sum on which to calculate the attorney's fee. The fee was determined by multiplying the 40% rate times the net present value of $275,000 to arrive at a fee of $110,000.

Section 319 provides for calculation of attorney's fees relating to the accrued lien by taking the proportion of the gross lien to the total recovery and multiplying that amount to the total attorney's fees. As the gross lien is $93,683 and the total recovery is $275,000 then the calculation works as follows: $93,683/$275,000 x $110,000 = $37,473. Claimant's actual debt to PMA for the accrued lien therefore is $93,683 minus the corresponding attorney's fees of $37,473 which results in a net accrued lien of $56,210. Employer, however, is not only liable for a pro rata share of attorney's fees based on the amount of compensation already paid but is also liable on the amount of *future* compensation it is relieved from paying due to the settlement. *Wall v. Conn Welding & Machine Co.*, 197 Pa. Superior Ct. 360, 179 A.2d 235 (1962).

Substituting this computation for the majority's results in the following:

The suspended compensation	$1,135.33	
multiplied by the factor of 40% equals the monthly debiting of the amount owed	$ 454.13	
multiplied by the 103 months from February, 1986, to September, 1994, ($454.13 x 103 = $46,775.60), or the amount the employer owed the claimant		$46,775.60
leaving a balance due to the employer from claimant as of September 1, 1994, in the amount ($56,210 - $46,775.60) =		$ 9,434.40
On a monthly basis the claimant should pay to the employer the monthly excess that the claimant receives, as a difference between the recovery and the suspended compensation of	$1,250.00 $1,135.33	
resulting in	$ 114.67	
added together with employer's allocation of attorney's fees of $454.13 =	$ 568.80	
the combined monthly reduction would continue until the next balloon payment due May, 1995, eight months equalling (8 x 568.80)		$4,550.40
leaving the balance due to the employer by the claimant before the balloon payment on May 20, 1995 of		$4,884.00

The remaining $4,884 should be paid to the employer from the balloon payment which is due on May 20, 1995. At this point the lien will be satisfied. Thereafter the employer will be realizing a benefit on a monthly basis as the claimant receives

the $1,250 settlement payments. Accordingly, employer will be obligated to keep paying the attorney's fees for such benefits. As of May, 1995, employer will have paid a total of $87,881.43 in attorney's fees. I believe Employer should pay $454.13 each month until May, 1998, when the amount will have reached $110,000.

This delay in payment of PMA's perfectly legitimate lien is traceable to the settlement which provided an initial lump-sum payment sufficient to pay the attorney's fees but not to pay the lien. The Supreme Court affirmed in *Wolfe v. Pennsylvania Manufacturer's Association Insurance Co.*, Pa. , 626 A.2d 522 (1993), that the attorney in the third-party action has priority over the lienholder. However, under the terms of this settlement no money was available to pay the lien despite the provisions of section 319, thus making delay inevitable.

I have attempted to fashion an equitable resolution between conflicting valid claims. I strongly urge counsel and parties in future third-party tort actions that are subject to worker's compensation subrogation rights to provide for payment of the accrued lien at the time of settlement because the language in Section 319 expressly provides for immediate reimbursement to the employer of the accrued lien at the time of recovery or settlement in the tort action.

Accordingly, I would vacate and remand with instructions to enter an order consistent with the foregoing.

/s/ McGinley
BERNARD L. McGINLEY, Judge

Judge Friedman joins in this dissent.

PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, Appellee/Cross-Appellant.

v.

Ronald B. WOLFE and Rose Wolfe, his wife, Richard C. Angino and Angino & Rovner, P.C., Appellants/Cross-Appellees.

Supreme Court of Pennsylvania.

Argued May 7, 1991.

Resubmitted Feb. 19, 1993.

Decided May 28, 1993.

Reargument Denied July 7, 1993.

Worker's compensation insurer sued injured worker and his attorney, seeking to enforce its statutory subrogation lien on settlement money recovered from third-party tort-feasor. The Court of Common Pleas, Dauphin County, Civil Division, No. 3233-S-1985, Dowling, J., held that insurer's subrogation interest had priority over attorney's rights, but that award to insurer would be limited to sum set aside as escrow for insurer and attorney pursuant to settlement agreement between worker and third party which was approved by insurer. Both parties appealed. The Superior Court, Nos. 96 and 139 Harrisburg 1988, 386 Pa.Super. 333, 563 A.2d 94, affirmed. Defendants appealed, and insurer cross-appealed. The Supreme Court, Nos. 006/007 Middle District Appeal Docket 1990, Papadakos, J., held that: (1) worker's compensation insurer waived breach of contract and negligence claims asserted against law firm which represented injured worker in suit against third-party tort-feasor by entering into agreement wherein parties agreed to escrow $55,000 of initial settlement amount in third-party action, pending resolution of dispute between insurer and law firm concerning disposition of settlement proceeds, and (2) attorney for injured worker was enti-

tled to priority payment from initial payment in structured settlement agreement.

Reversed.

Cappy, J., concurred in result.

Flaherty, J., filed dissenting opinion in which Nix, C.J., joined.

Zappala, J., dissented.

1. Compromise and Settlement 16(1)

Worker's compensation insurer waived breach of contract and negligence claims asserted against law firm which represented injured worker in suit against third-party tort-feasor by entering into agreement wherein parties agreed to escrow $55,000 of initial settlement amount in third-party action, pending resolution of dispute between insurer and law firm concerning disposition of settlement proceeds.

2. Workers' Compensation 2247, 2251

Attorney for injured employee is entitled to be paid first from settlement fund created in suit against third-party tort-feasor, before worker's compensation carrier or employee receives any benefit from third-party settlement; carrier cannot expect to receive settlement money before injured employee has right to receive such money, and employee cannot expect to receive such money without first paying contractual obligation incurred in return for attorney's work in creating fund. 77 P.S. §671.

3. Workers' Compensation 2247

Attorneys for injured worker who brought third-party suit against tort-feasor were entitled to first payment from initial payment in structured settlement agreement with tort-feasor, notwithstanding that initial payment was not sufficient to reimburse worker's compensation carrier as provided in section of the Workers' Compensation Act for benefits carrier had

paid worker. (per Papadakos, J., with two Judges concurring and one Judge concurring in the result.) 77 P.S. §671.

Richard C. Angino, Harrisburg, for appellees.

Dennis J. Bonetti, Harrisburg, for appellant.

Before NIX, C.J., and LARSEN, FLAHERTY, ZAPPALA, PAPADAKOS, CAPPY and MONTEMURO, JJ.

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

PAPADAKOS, Justice.

We are called upon to determine the priority of payment from an initial lump sum payment arising out of a structured settlement. Are the attorneys who created the fund for their injured client to be paid their fees in full before the rights of a subrogee are fulfilled, or should the subrogee, the worker's compensation carrier which advanced payments to the injured client during the pendency of the settlement, be reimbursed before any other payments are made? Or should the proverbial baby be cut in half?

This case arises from injuries suffered by Appellant-Cross-Appellee, Ronald Wolfe (hereinafter "Wolfe"), when he fell while making deliveries for his employer. The employer's compensation carrier, Pennsylvania Manufacturers' Association Insurance Company, (hereinafter PMA), Appellee-Cross-Appellant, paid Wolfe's compensation benefits. Wolfe subsequently instituted a personal injury action against a third party tortfeasor. Wolfe was represented by Appellant-Cross-Appellee, the law firm of Angino & Rovner, P.C. (hereinafter "Angino"), who were to be paid a contingent fee equal to forty (40%) percent of the amount recovered.

In April of 1985, settlement negotiations between the third party tortfeasor and Wolfe began. The result was an

agreement that the case would be settled on the basis of a structured settlement whereby the total value of the settlement would not be paid at settlement, but rather spread out over a number of years. The structure envisioned an initial payment of $110,000.00 to Wolfe, which Wolfe orally agreed to pay Angino as full payment for Angino's contingent fee, plus monthly payments to Wolfe of $1,250.00 for life. Wolfe was also to receive sizeable lump sum payments every five years for the next twenty-five years.

PMA objected to the proposed settlement on the ground that it did not provide a sufficient initial payment to reimburse PMA as provided in Section 319 of the Worker's Compensation Act,[1] for compensation it had already paid Wolfe. Eventually the parties agreed to escrow $55,000.00 of the initial settlement amount, pending resolution of the dispute between PMA and Angino. PMA subsequently instituted the instant action seeking to enforce its statutory subrogation lien. The trial court found that PMA's statutory subrogation interest had priority over Angino's rights, and awarded the escrowed funds

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[1] 77 P.S. §671, Section 319 of the Act, provides, in relevant part:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employee, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of the compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employe, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation.

to PMA. The Superior Court affirmed, 386 Pa.Super. 333, 563 A.2d 94, and this appeal followed.

Wolfe and Angino contend that the trial court and the Superior Court erred in determining that PMA, rather than the attorneys, is entitled to first payment from the lump sum initial payment in the structured settlement. PMA argues that the Superior Court erred in upholding the trial court's grant of Wolfe's Motion for Summary Judgment as to Counts II and III of PMA's complaint and in upholding the trial court's refusal to award PMA damages from breach of contract or negligence.

In reviewing this first issue, the Superior Court properly noted that this case does not involve a question of entitlement, but rather a question of priority. PMA is entitled to payment because it fulfilled its duty to provide compensation benefits to Wolfe, and Angino is obviously entitled to payment for assisting in the creation of a fund from which benefits and compensation could be paid. The question is, who takes first? The Superior Court thought that PMA did.

As noted, PMA objected to the proposed settlement on the ground that it did not provide a sufficient initial payment to reimburse PMA as provided by Section 319 of the Worker's Compensation Act for compensation it had already paid Wolfe, and PMA subsequently instituted the instant action seeking to enforce its statutory subrogation lien. Count II of PMA's Complaint was a contract claim in which PMA alleged that Angino agreed to represent PMA in connection with the Wolfe personal injury suit, but in failing to do so, is liable for damages in the amount of all benefits PMA paid to Wolfe, plus interest. Count III of PMA's Complaint was a tort claim in which PMA alleged that Angino was negligent in failing to protect PMA's subrogation interest. The trial court awarded the escrowed funds to PMA, as noted, but granted Angino's Motion for Summary Judgment as to Counts II and III of the Complaint,

refusing to award PMA any damages for breach of contract or negligence by Angino. PMA filed the instant cross-appeal with regard to the Superior Court affirmance of the trial court's grant of summary judgment as to Counts II and III.

[1] We will first take up and consider, as did the Superior Court, PMA's cross-appeal. Our review of the record in this case indicates that the trial court properly granted Angino's Motion for Summary Judgment. The trial court found that PMA waived its claims under Counts II and III by entering into the Escrow Agreement of June 25, 1985.[2] That agreement was made for the specific purpose of obtaining a settlement in the Wolfe negligence action and, as noted by the trial court, "it embodies the outer limits of the parties (sic) rights and liabilities with respect to the priority of their claims." The facts in this record amply support the finding of waiver; the Superior Court affirmed; and we will not disturb their conclusions.

[2] As to the priority question, however, we must reverse the Superior Court. Section 319 of the Worker's Compensation Act, 77 P.S. §671, cited above, is at least clear that an employer is *subrogated* to the *"right"* of an employee.

But the Superior Court panel misconstrued the nature of the question at issue here. They stated that:

Determining who shall be paid first is a question of statutory construction. That is, where there is a structured

[2] The agreement recited, in part:

WHEREAS, a dispute has arisen between Angino and PMA as to PMA's entitlement to recover its subrogation lien from the initial lump sum payment of $110,000. It is PMA's position that it is entitled to recover the [sic] subrogation interest from the initial lump sum payment to the extent of 60 percent of PMA's total workmen's compensation lien existing at the time of this Agreement and which would recognize a 40 percent attorney's fee payable to Angino for professional services rendered in connection with developing the settlement fund.

settlement and some monies are paid at the outset, but the initial payment is not enough to cover the claims of both the attorney for the employee and a subrogated employer/carrier, does Section 319 contemplate that the injured employee's attorney shall be paid first out of those monies, or does it contemplate that the employer/carrier will be paid first?

563 A.2d at 99.

The central issue in this case must be resolved on subrogation principles (which Section 319 makes expressly relevant) consistent with standards of fairness and equity. As to subrogation, it has been stated that:

> The rights to which the subrogee succeeds are the same as, but no greater than, those of the person for whom he is substituted. He cannot acquire any claim, security, or remedy the subrogor did not have. Moreover, the rights, claims, and securities to which he succeeds are taken subject to the limitations, burdens, and disqualifications incident to them in the hands of the party to whom he is subrogated, and subject to any defenses that might have been urged against the latter. Beyond this he has no right and no valid claim for protection.

73 Am.Jur.2d, Subrogation §106, pp. 665-6. On this logic, it would seem that if an employee enters into a contingent fee agreement and a structured settlement agreement is reached to pay the attorney who creates the fund a 40% fee, the employer's subrogation lien is subordinate to the contract claims of the attorney. The worker's compensation carrier is not entitled to any subrogation until the injured employee has the "right" to and receives such compensation.

In determining whether or not an injured employee is entitled, or has a "right," or does receive any payment from a third party, one must first deduct reasonable attorney's fees

and expenses incurred in obtaining a recovery or in effecting a compromise settlement in the first place. The reasons for this conclusion are simple ones. The attorney must get *first* priority because the equitable doctrine of subrogation so dictates and, most significantly, simple principles of fairness instruct us that, *but for the attorney's actions,* there would be no fund for *either* the worker's compensation carrier or for the client-injured employee.

This Court, in the case of *Rollins Outdoor Advertising v. Workmen's Compensation Appeal Board*, 506 Pa. 592, 487 A.2d 794 (1985), expressed the statutory requirement for calculating the carrier's pre-settlement subrogation lien and its responsibility for fees and expenses in express terms. We clearly required that the attorney's fees and other proper disbursements be subtracted first from the gross recovery to get the net recovery. What we held there implicitly, we now hold expressly, *i.e.*, that the attorney who creates the fund is entitled to be paid first before the worker's compensation carrier or the employee receives any benefit from a third party settlement. This is regardless of how the attorney's fee is pro-rated ultimately between the employer and the employee.

In the few remaining areas where worker's compensation subrogation continues, the system does at least provide some equity and fairness by requiring that both the carrier and the injured victim share the costs of the attorney who creates the fund. It leaves the victim and his attorney in control as to when a case is settled or tried and as to the type of settlement entered into. The carrier benefits from the whole third-party settlement by a combination of initial reimbursement and/or subsequent suspension of payments, until such time as they equal the value of the net settlement. The client is charged a fee on the value of the entire third-party settlement, and the carrier, which takes advantage of the whole fund, must pay a propor-

tionate share for this enlarged—and very valuable—benefit. Both carrier and employee receive something less than full reimbursement because each must pay toward the incurred attorney's fees and costs which under our system are not recoverable from the third party tortfeasor.

The Superior Court, in its opinion, states that the precise question involved in this case has not been "previously addressed in our appellate case law." However, Wolfe-Angino correctly assert that the underlying principles have been well-settled for some time, and the Superior Court panel, in deciding to give the worker's compensation carrier a right to the up-front monies superior to that of the attorney creating the fund, has placed itself at odds with subrogation principles and with prior decisions of our Court as well as with those of its own Court.[3]

Subrogation is an equitable principle and the subrogee carrier can have no greater rights than the subrogor employee. The subrogor employee entered into a contingent fee agreement to pay a 40% fee. PMA cannot expect to receive money before the injured employee has the right to receive money and cannot expect to receive money without first paying his contractual obligation incurred in return for the attorney's work in creating the fund.

Despite *Rollins and Furia v. City of Philadelphia,* 180 Pa.Superior Ct. 50, 118 A.2d 236 (1955), the Superior Court held that PMA deserves to be fully compensated from any and all third-party settlement cash and that Mr. Wolfe's counsel

[3] Under prior Worker's Compensation statutes, this Court held that the employer's right of subrogation extends only to the *net* amount of a verdict against a third party wrongdoer after deducting attorney fees and expenses. See, *Ellis v. Atlantic Refining Co.*, 309 Pa. 287, 163 A. 531 (1932). See also *Wilson v. Pittsburgh Bridge and Iron Works*, 85 Pa.Super. 537 (1925); *Vitello v. Mazen*, 19 W.C.B. 193 (1936); and see, Skinner, Workmen's Compensation Law of Pennsylvania, Vol. II, (Geo. T. Bisel Co., 1947), pp. 921-923.

should be reimbursed for the balance of any attorneys' fees and costs from the periodic payment to be paid to Mr. Wolfe. Such a ruling clearly ignores and interferes with a lawful contingent fee agreement, the third party settlement, and equitable subrogation principles. The worker's compensation carrier, in effect, gets fully reimbursed while the attorneys receive their fees over a period of 18 1/3 years at the rate of $500,00 per month. (Assuming the contingent fee was $110,000.00) The injured worker would thus receive less ($750.00 monthly) than his worker's compensation payments ($1,133.33 monthly) would have been and must wait for his money.

The worker's compensation law cannot be applied in such a manner as to place the injured employee in a position of receiving less monthly benefits after a settlement than he was receiving in worker's compensation payments. Third party settlements inure to the benefit of the carrier as well as the injured employee and the attorney's. The carrier's position would have a chilling effect upon such settlements to the detriment of all concerned except the third party tortfeasor.

The panel's decision in this case is in conflict with another panel's decision in *Johnson v. Sears, Roebuck & Company* and leaves attorneys with no guidance on how to calculate a contingency fee on a structured settlement. In *Johnson v. Sears, Roebuck & Co.*, 291 Pa.Superior Ct. 625, 436 A.2d 675 (1981), a panel of the Superior Court held:

> The Johnsons urge us to find that the most equitable method of determining the amount due their former attorneys is to award them one-third of the lump sum payments plus one-third of any periodic payments if and when received. ... Considering the nature of annuity settlements and the fact that they may be paid out over

> an extensive period of time, we believe this method of payment can be both unwieldy and impractical.

Johnson, 436 A.2d at 678.

The panel, in the instant case, provides for plaintiff attorneys to be paid in such a fashion as *Johnson* considered as "both unwieldy and impractical."

[3] The parties and their counsel in the third party settlement assert that they relied on the Superior Court's holding in *Johnson* and our holding in *Rollins* to structure the terms of settlement. The Superior Court panel, however, overruled *Johnson, sub silentio*. For the reasons set forth above, we hold that the attorneys for Wolfe were entitled to first payment from the initial payment in the structured settlement agreement. To that extent, the Superior Court decision in this case is reversed.[4]

CAPPY, J., concurs in the result.

FLAHERTY, J., files a dissenting opinion in which NIX, C.J., joins.

ZAPPALA, J., dissents and would affirm based on the Superior Court opinion.

FLAHERTY, Justice, dissenting.

While the majority's contractual analysis is sound, I think it overlooks the fundamental consideration of the case, which is the fiduciary relationship between attorney Angino and the Pennsylvania Manufacturers' Association Insurance Company (PMA). Angino totally abandoned his duty to his client PMA, so he should not be permitted to profit from his misfeasance.

[4] Our resolution will provide full payment to the attorneys in satisfaction of their contingency fee agreement, the injured party will continue to receive the sum of $1,250.00 per month from the structured settlement, and the worker's compensation carrier will suspend its obligation to pay the injured worker the sum of $1,135.33 per month until its subrogation rights are satisfied.

After undertaking to represent the Wolfes in a personal injury action against the owner of land on which Mr. Wolfe was injured, Angino agreed to represent PMA, the workers' compensation carrier of Wolfe's employer, with regard to PMA's statutory lien under 77 P.S. §671, the right to recoup its compensation payments from an injured worker's judgment against a negligent third party. In so doing, Angino undertook all the duties an attorney owes to his client as set forth in the Rules of Professional Conduct governing the practice of law in Pennsylvania. Such duties include, among others, the need to make full disclosure before representing multiple clients if there might be a conflict of interest between the clients or between the lawyer and one or more clients, Rule 1.7(b), and the prohibition against settling a case involving multiple clients without full disclosure and consultation with all clients, Rule 1.8(g).

At a minimum, attorney Angino neglected to fulfill these obligations to his client PMA. During settlement negotiations with the third-party defendant, Angino never advised PMA that a second option was available which would have provided $135,000 as an initial payment. Further, Angino admitted that he never contacted the third-party insurer to determine whether additional monies could be obtained to cover PMA's lien. To the contrary, Angino candidly testified:

> In this particular situation, there would have been no reason to have gotten more than our fee up front, because it would have gone to PMA. There is no kidding about the matter. If we had taken in, as an example, up front $150,000, there would have been $40,000 there that potentially PMA would have some call for, so as this case in its factual contents presented itself, once the client decided to go structure rather than deciding to go lump

> sum, the primary benefits to the client would be for us not to get anything but our fee.

Angino reiterated later:

> Because that would have been a decision of an attorney and a carrier to say these are the attorneys fees and expenses, and this comes up front, and if any more is gotten it will just go to PMA. ... Why would you want to get any more up front because basically you'd just be giving it to PMA[?]

I think such an admission is shocking and unethical, coming, as it does, from an attorney who had agreed to represent PMA in regard to its statutory lien. For a 40% fee Angino was to protect PMA's statutory lien, but his intent was to avoid a settlement that would provide anything to PMA up front. It was extremely important to Angino that his $110,000 fee be paid entirely up front, but PMA, his client, did not, in his mind, have a similar interest in receiving payment at the time of settlement. It is difficult to understand how the majority can accept such a standard of representation. I believe PMA, or any client, is entitled to much better protection of its interests. I think, therefore, the trial court was correct in awarding the entire escrow fund to PMA.

Thus I would affirm the order of the Superior Court.

NIX, C.J., joins this dissenting opinion.

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-92466

Appeal by Claimant/Defendant from Order of Referee Deeley, S.S. #161-34-1508, HBG/JANUARY, 1987

RONALD B. WOLFE, Claimant
431 Valley St.
Marysville, PA 17053

vs.

ALLEGHENY BEVERAGE CORP., Defendant
2501 Sycamore St.
Harrisburg, PA 17111

AFFIRMED IN PART;
REVERSED IN PART

Insurance Carrier:
PMA Insurance Company
P.O. Box 604
Lemoyne, PA 17043

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Philadelphia, PA 19107

OPINION

McANENY, COMMISSIONER:

This case appears before the Board on cross appeals filed by Claimant and Defendant from the Decision and Order of Referee James P. Deeley. Referee Deeley granted Defendant's Suspension Petition and awarded subrogation to the employer due to the third party settlement. The Referee suspended weekly compensation and granted employer a $26.46/week credit to be applied against its lien for compensation paid. The Referee also ordered employer to pay Claimant $115.38/week as its proportionate share of attorney's fees until Claimant is reimbursed the amount of $110,000.00. The Referee further ordered that the employer's lien for past compensation shall be paid through future lump sum payments to be received by the employee under the structured settlement. On appeal, Claimant alleges that the Referee erred in granting employer and PMA subrogation without first proving third party negligence; that it was error to suspend benefits indefinitely rather than for only 620 weeks; that it was error to grant PMA a subrogation lien which could attach to future lump sum payments rather than a lien to be discharged through an extended grace period; that it was error to grant PMA a weekly credit of $26.46. On the other hand, Defendant alleges that Finding of Fact #8 is not supported by the evidence. Defendant further argues that the Referee erred in not applying the formula outlined by the Pennsylvania Supreme Court in *Rollins v. Outdoor Advertisng Company*, 487 A.2d 794 (1985); that the Referee ordered employer to pay Claimant $115.38/week as its proportionate share of attorney's fees until Claimant is reimbursed the amount of $110,000.00 which is the *total*

amount of attorney's fees rather than a proportionate share. Employer further alleges that the Referee erred in determining that the first lump sum payment of $110,000.00 constituted Claimant's attorney's fees on the third party tort feasor action thus concluding that there was no fund from which to reimburse past liened compensation paid by PMA. Lastly, Defendant argues that while the Referee gave employer a credit of $26.46/week, to accumulate, to be applied against its lien for compensation paid, the Referee did not make other provisions to assure PMA received the benefit of excess payment beyond the suspended benefits.

The undisputed facts of this case are that on December 19, 1981, Claimant sustained a knee injury while in the course of his employment with Allegheny Beverage Corporation. A Notice of Compensation Payable issued and Claimant received compensation at the rate of $262.00/week. As of September 19, 1985, PMA had paid benefits of $87,468.81 ($50,902.86 in compensation and $36,565.95 in medicals). Between 9/20/85 and 2/18/86, PMA paid $6,214.00 in benefits ($5,764.00 in compensation and $450.00 in medicals). Ronald Wolfe and his wife instituted a third party tort feasor suit and that case was settled by written agreement dated August 2, 1985, with a structured settlement. The settlement agreement provided for $110,000.00 lump sum payment immediately with periodic payments of $1,250.00 per month for life (20 years guaranteed) with additional periodic balloon payments at five year intervals commencing in 1990 and continuing to 2010. The future lump sum payments totaled $150,000.00. The agreement placed a present value at $274,000.00. Plaintiffs' attorney in the third party action contended that the $110,000.00 lump sum payment was to cover their 40% attorney's fee contract and expenses. PMA asserted the right to one-half the sum because of their lien for past compensation paid. Because the parties could not resolve the entitlement

issue on the $55,000.00, the parties agreed to escrow $55,000-.00 of the $110,000.00 lump sum payment. These terms were contained in the August 2, 1985 settlement agreement.

Cases involving subrogation claims can be complex when past, present and future compensation is involved, when attorney's fees need to be prorated, and especially when, as here, a structured settlement is involved and the present value of the settlement is less than the long range value over a period of 20 years. There were several factors complicating this case before the Board and we have made an effort to simplify the legal issues as much as possible without missing any points. Our scope of review, of course, is limited to determining whether there has been a constitutional violation, or an error of law, or whether substantial evidence supports the Findings. *Estate of Francis J. McGovern v. State Employees' Retirement Board*, 517 A.2d 523 (1986). The issues on appeal pertained to legal matters rather than to factual issues since most pertinent facts are undisputed.

The Board has carefully reviewed Referee Deeley's Decision and Order, briefs and memoranda filed by the parties, relevant appellate case Decisions and disposes of the issues on appeal as follows.

Contrary to Claimant's argument, the subrogation lien for past and future compensation is given to the employer even where the third party case is settled and the negligence of the third party has not been established. *Heiser v. Workmen's Compensation Appeal Board*, 505 A.2d 1060 (1986) and *Trumball v. Paris Linen & Decorating Shops, Inc. et. al.*, 377 A.2d 1004 (1977).

As for the proper allocation of the settlement proceeds, we believe that plaintiff's attorneys on the third party tort feasor action should be paid the attorney's fee and expenses as contracted between plaintiffs and their attorneys (40% of the

settlement or award). By virtue of the settlement agreement, the first lump sum payment of $110,000.00 was to cover the contracted attorney's fees, expenses, etc. We see no evidence anywhere that plaintiff's lawyers on the third party action are to receive any additional fees. The $110,000.00 initial lump sum payment one-half of which was paid to plaintiff's attorneys and one-half of which was escrowed pending litigation, should all be paid to plaintiff's attorney in full discharge of plaintiff's contractual obligation to them. Employer's lien for past compensation paid must be met through other monies. Referee Deeley ordered that employer's lien for past compensation paid be paid out of future lump sum payments due Claimant totalling $150,000.00 to be received from 1990 to 2010. We agree that employer should recoup its liened amount totalling $93,682.81 from the future lump sum payments of $10,000.00 on May 20, 1990; $20,000 on May 20, 1995; $30,000.00 on May 20, 2000; $40,000.00 on May 20, 2005; and $50,000.00 on May 20, 2010. While we are sure that PMA would prefer present payment of its lien because of the concept of "time value of money," we cannot devise a fair method by which to accomplish this given the terms of this structured settlement. See *Dasconio v. Workmen's Compensation Appeal Board*, 559 A.2d 92, 102 (1989). The big picture must be kept in mind that had plaintiff and his lawyers not succeeded in the third party settlement, no fund whatsoever (present or future) would exist from which employer could obtain reimbursement for past compensation paid or the opportunity for suspension of future compensation. Our view is that plaintiff's attorney's fees should be paid by the $110,000.00 according to their contract and that employer will have to wait to receive their liened amount for past compensation due. There is nothing speculative about the future lump sum payments. They will be paid as part of the settlement contract. In addition to the future lump sum payments to cover the liened compensation, the Referee also

provided that the amount of $26.46/week shall be credited to employer as an offset against the lien for compensation paid. The $26.46/week is the difference between the compensation weekly rate ($262.00) and the settlement weekly rate ($288.46). It was an error of law for the Referee to have granted any credit whatsoever on the extra $26.46/week. Payments made in relief of an employee's incapacity to work rather than his wages for work performed discharged the employer's liability for workers' compensation for those weeks in which payments equaled or exceeded compensation due, *but payments made in excess of compensation payable could not be credited on future installments of compensation.* See *Peoples Natural Gas v. Workmen's Compensation Appeal Board*, 441 A.2d 1364 (1982).

Pursuant to Section 319 of the Act, 77 P.S. Section 671, an employer and carrier are entitled to subrogation from sums recovered from a negligent third party. Section 319 also provides that the employer is liable to pay its pro-rata share of reasonable counsel fees and expenses. While employer argues to the contrary, we believe that the employer is also charged with its pro-rata share of legal expenses of the future installments of compensation payable and not just its pro-rata share of legal expenses for satisfaction of the liened compensation. In *Dasconio v. Workmen's Compensation Appeal Board*, 559 A.2d 92, 101 (1989), the Commonwealth Court addressed this very issue:

> "In return for receiving that benefit of a credit against future installments, is the employer charged with a pro-rata share of the legal expense attributable to generating that credit? ... Hence, the duty to share the burden of legal expense also extends to the future subrogation as well as to the past."

Lastly, we direct ourselves to the mechanics of providing for the subrogation and the payment of the pro-rata share of attorney's fees on the past liened compensation and on future credit for compensation. The liened compensation due is $93,682.81. Since the attorney's fee paid by Claimant to create this fund was 40%, we believe employer's lien should be $56,209.69 since 40% of $93,682.81 is $37,473.12. Out of the future lump sum payments of $150,000.00, the first of which was paid in May of 1990, employer should receive the first $56,209.69 as payment for its lien for past compensation. We are aware that we have not utilated the formula set forth in *Rollins Outdoor Advertising et al. v. Workmen's Compensation Appeal Board*, 487 A.2d 794 (1985) in computing the recovery of past benefit payments, attorney's fees, etc., as set forth in algebraic terms in *Rollins, supra.* Rather, we have utilized the Bureau's method and that set forth by Barbieri in *Pennsylvania Worker's Compensation*, Section 5.46(4)(1985) and case law and the PBI Worker's Compensation Practice and Procedure Guide. We prefer the method employed here because it can easily be applied to both past and future subrogation and attorney's fees obligations. One reason we have not applied the *Rollins* algebraic formula is our inability to conclude whether to adopt Claimant's argument of using the "present value" figure of the structured settlement or the guaranteed 20 year value of the structured settlement in computing the grace period. Frankly, we are perplexed under the circumstances here. To follow Claimant's interpretation of *Rollins, supra* he would receive two nontaxable incomes after a grace period of 620 weeks. Under Defendant's interpretation of *Rollins, supra,* the grace period would be 1,383 weeks. The following instructive language from Barbieri was helpful to the Board:

> "A more complex situation is seen where some compensation has been paid and some is still payable. There is no law or decisional experience, involving cases where a fixed

fee was charged in the compensation case, but the result should be no different than where a contingent fee was charged. Experience has been in the area of contingent fees, because this is the usual form of fee arrangement for payment upon recovery in third party, or tort feasor, negligence cases. In the situation under discussion, however, where some future compensation payments are still unpaid, the net amount due the plaintiff in the third party case is first computed. At this point the employer or compensation carrier presents his or its claim for past workmen's compensation benefits already disbursed (benefits, medical expenses, etc.). This amount is then subject to deduction for the expense of collecting it. If the negligence lawyer for the employe-plaintiff charged 33 1/3 per cent of the recovery, then subrogor's claim is reduced by one-third which is compensation subrogor has now recovered two-thirds of its pay out. What the plaintiff actually received, (less what he was credited, the one-third in the example above, for fees and costs), now becomes subrogable against future unpaid items due under the compensation laws. The employer or insurer now seeks a suspension of future compensation liability, but he is only entitled to a partial suspension, credit from the future subrogable amount received by the injured worker to the extent of two-thirds of each weekly future payment. He must continue to pay weekly to the claimant one-third of each benefit payment as it falls due, this again paying back to the claimant what it cost him to get the subrogable sum. This goes on until all of the net amount that is subrogable as against future unpaid benefits is exhausted at the rated* of two-thirds of each benefits installment or until all compensation liability for the injury involved has terminated."

See, Barbieri, *Pennsylvania Workmen's Compensation*, "Compensability and Benefits" Section 5.46(4) (1985); *Long v. Marino Masse, Inc.*, 205 Pa. Super. 344, 208 A.2d (1965); *Mazzeo v. M. & J.B. McHugh*, 199 Pa. Super. 400, 185 A.2d 638 (1962); *Wall v. Conn Welding and Machine Company*, 197 Pa. Super. 360, 179 A.2d 235 (1962); *Soliday v. Hires Turner Glass Company*, 187 Pa. Super. 44, 142 A.2d 425 (1958).

Following the above guidelines for computation of employer's credit for future unpaid items due under the compensation laws, we conclude that employer is entitled to a partial suspension. Under the compensation laws, employee is entitled to $262.00 per week of compensation. Employer must pay weekly to the Claimant 40% of each benefit payment as it falls due, to pay back to the Claimant what it cost him to get the subrogable sum (i.e., attorney's fees). This amount equals $104.80 per week. Thus, during this period of suspension, employer or carrier must pay Claimant $104.80 per week as its pro-rata share for Claimant's attorney's fees which, by the way, Claimant has already paid in full under the terms of this settlement agreement and our opinion ($110,000.00). Of the $110,000.00 in attorney's fees/costs, employer has already paid or will be paying $37,473.12 in attorney's fees when it recovered or recovers its liened compensation. We believe that the employer's remaining obligation on attorney's fees must be $72,527.00. Thus, employer must pay Claimant during this period of suspension the weekly sum of $104.80 as its pro-rata share of attorney's fees until $72,527.00 has been paid. Once the attorney's fees of $37,473.12 and $72,527.00 have been paid, employer's partial payments during suspension shall cease. This suspension/partial suspension goes on until all of the net amount that is subrogable as against future unpaid benefits is exhausted. In this case, Claimant has a lifetime

ORDER

Cross appeals filed by Claimant and Defendant are granted in part and dismissed in part. Referee Deeley's Decision and Order are affirmed in part and reversed in part as more specifically set forth in the foregoing Opinion.

BY THE BOARD

/s/ Joseph J. McAneny
COMMISSIONER

CONCURRED IN BY

JUL 17 1990

/s/A. Peter Kanjorski
/s/William R. Davis
/s/William J. Atkinson

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
HARRISBURG, PENNSYLVANIA 17111

REFEREE'S DECISION

S.S. No. 161-34-1508

Ronald B. Wolfe
431 Valley Street
Marysville, PA 17053

vs.

Allegheny Beverage Corporation
2501 Sycamore Street
Harrisburg, PA 17111

SUSPENSION

PMA Insurance Company
P.O. Box 604
Lemoyne, PA 17043

BEFORE:
James P. Deeley
Workmen's Compensation Referee
3607 Derry Street
Harrisburg, PA 17111

HEARING DATE(S):
February 19, 1986
April 30, 1986

COUNSEL FOR CLAIMANT:
Joseph Melillo, Esquire
4503 North Front Street
Harrisburg, PA 17110

COUNSEL FOR DEFENDANT:

Dennis J. Bonetti, Esquire
2931 North Front Street
Harrisburg, PA 17110

WITNESSES & EVIDENCE FOR CLAIMANT:

C-1 Settlement Discussion Letter
C-2 Complaint
C-3 Answer to Complaint
C-4 New Matter Counterclaim
C-5 PMA Answer
C-6 Motion for Judgement
C-7 Motion for Argument

WITNESSES & EVIDENCE FOR DEFENDANT:

D-1 Complaint
D-2 Settlement Agreement
D-3 Printout of Compensation Paid
D-4 Distribution
D-5 D-6 & D-7 Letters

FINDINGS OF FACT

1. The claimant received compensation at the rate of $262.00 a week. A supersedeas was granted in February 1986.

2. The parties submitted various pleadings, documents, and letters. The claimant received a settlement involving a claim against a third party. The question is the right of subrogation of PMA.

3. The claimant asserts that PMA must show there was negligence on behalf of the third party before a subrogation attaches.

4. The claimant received money in the nature of a settlement which paid him $1,250.00 a month from June 20, 1985. This money shall be paid through the life time of the claimant with a twenty year guarantee.

5. The claimant, on various dates, receives money in lump sums. On May 20, 1990 he receives $10,000.00. May 20, 1995 the claimant will receive $20,000.00. On May 20, 2000 the claimant will receive $30,000.00. On May 20, 2005 the claimant will receive $40,000.00. On May 20, 2010 the claimant will receive $50,000.00.

6. The defendant agrees to pay $110,000.00 in a lump sum.

7. $55,000.00 of this is in escrow pending court determination.

8. This money is to be paid to the attorneys as attorney's fees unless the court would direct differently.

9. A motion for judgement on the pleadings is pending.

DISCUSSION OF FINDINGS AND CONCLUSIONS

This is basically a legal argument. The settlement agreement is a matter of record. Preliminary• I did not find merit in the claimant's contention that negligence must be proven. It appears to me the recent cases hold that the right of subrogation is broad right and would attach whenever there is a work related injury and a third party recovery. In fact it even attaches to recovery for pain and suffering. *Swink vs W.C.A.B.*, 510 A.2nd 860 (Pa. Commonwealth, 1986)

Section 319 of the Act states:

> Where the compensable injury is caused in whole or in part by the act or admission of the third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or effecting a compromise settlement shall be pro rated between the employer and the

> employee, his personal representative, his estate, or his dependents. The employer shall pay the proportion of the attorney's fees and other proper disbursements at the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee, his personal representative, his estate, or his dependents, and shall be treated as an advance of payment by the employer on account of any future installments of compensation.

The defendants have paid $93,682.81 in compensation to date with $56,666.85 of that being weekly payments and the remainder medical payments.

The leading case on this issue is *Rollins vs Outdoor Advertising Company.* This decision of the Supreme Court sets forth various formula for calculating the amount of weeks for which the defendant does not have to pay compensation. If the recovery is more than weekly payments owed, then the employer is given a grace period, during which it does not have to pay weekly compensation. The case also describes the formula for calculating attorney's fees. The claimant was the one who obtained a third party settlement. When there were expenses involved in obtaining this settlement the defendant has to pay its portion of the settlement.

It appears to me that to a large extent *Rollins* does not apply to this case. *Rollins* deals with the method of computation. It presumes that there is a lump sum. Here the only lump sum is an attorney's fee. The claimant himself receives compensation a rate of $1,250.00 a month or $288.46 a week. This continues for life. It appears to me that the defendant does not have to pay any more weekly compensation since the claimant will receive total weekly compensation for life. Compensation

is due and payable on a weekly basis but is often paid monthly. Here the obligation should be considered discharged on a weekly basis. Since the agreement extends for life, compensation would never restart because the obligation to pay compensation is for life.

The extra $20.00 should accumulate to discharge the lien of the carrier for past compensation paid. Let us note that the underlying principle involved is that the employer is subrogated to the entire amount of the net recovery. The employee is supposed to reimburse payments made and treat the excess as an advance payment. Here there is no fund to reimburse payments made and the advance payments extend over the lifetime.

The analysis would apply to attorney's fees. Although the agreements state that it is a lump sum, it appears that this money is an attorney's fee. Again it appears that attorneys have accelerated their fee to a lump sum in the present while the claimant receives his money over the length of the obligation.

The lien of previously paid compensation still remains. When a claimant receives lump sum payments in the future it appears to me that the lien would be affected by those payments since they are lump sum pursuant to a settlement agreement. In addition there is an accumulation of $20.00 a week.

Finally the question of attorney's fees. Again, it appears to me that the proper rational* is on a weekly basis. The defendant is benefiting to the amount of $288.46 a week. It appears to me that they should pay 40% of that cost or $115.38 a week over 933.37 weeks or approximately eighteen and one third years. Upon discharge of the attorney's fees obligation, compensation would remain suspended.

Suspending compensation subrogates the employer to the "extent of compensation payable under this article" since

compensation is payable weekly and, in effect, is being paid weekly.

CONCLUSIONS OF LAW

1. When a settlement and a third party action arise out of an incident which gave rise to a workers' compensation claim, the employer is entitled to subrogation without the necessity of showing negligence.

2. When a third party settlement arranges for payments on a monthly basis into the future for the life of the claimant, the employer's obligation for weekly compensation payments is discharged on a weekly basis for the life of the claimant. In this case compensation will be suspended indefinitely.

3. The employer remains responsible for the work related medical bills.

4. The employer retains a lien for compensation paid prior to the start of the weekly payments.

5. The employer has to pay a proportionate share of attorney's fees which effectuated the settlement.

6. Where a settlement provides for lump sum payments in the future, the employer's lien still attaches against those lump sum payments.

ORDER

The employer is awarded subrogation in regard to the third party settlement received by the claimant in this matter. Compensation is suspended with regard to the duty to pay weekly compensation. The employer is allowed a credit in the amount of 26.46 a week, which shall accumulate, to be applied against its lien for compensation paid.

The employer shall pay to the claimant $115.38 a week as its proportionate share of attorney's fees until the claimant is reimbursed in the amount of $110,000.00.

The employer has a lien for compensation already paid against future lump sum payments which may be received by the employee.

/s/James P. Deeley
James P. Deeley
Referee

JPD/pas
October 7, 1986

PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, Appellee,

v.

Ronald B. WOLFE and Rose Wolfe, His Wife, Richard C. Angino and Angino & Rovner, P.C., Appellants.

PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, Appellant,

v.

Ronald B. WOLFE and Rose Wolfe, His Wife, Richard C. Angino and Angino & Rovner, P.C., Appellees.

Superior Court of Pennsylvania.

Argued Sept. 7, 1988.

Filed July 11, 1989.

Reargument Denied Aug. 31, 1989.

Workers' compensation insurer sued injured worker and his attorney, seeking reimbursement from settlement recovered from third-party tort-feasor of insurance payments made. The Court of Common Pleas, Dauphin County, Civil Division, No. 3233-S-1985, Dowling, J., held that insurer was entitled to first payment out of amount currently available from third-party tort-feasor as part of structured settlement, but that amount would be limited to sum set aside as escrow for insurer and attorney pursuant to settlement agreement between worker and third party which had been approved by insurer. Both parties appealed. The Superior Court, Nos. 96 and 139 Harrisburg 1988, Beck, J., held that: (1) recovery of insurer was properly limited to amount in escrow under settlement agreement, and (2) as to that fund insurer was entitled to first payment.

Affirmed.

1. Compromise and Settlement 17(2)

Workers' compensation insurer was bound under terms of settlement agreement between injured worker and third-party tort-feasor which contemplated release by insurer of claims against third party in return for payment of whatever portion of $55,000 escrow was determined to be due insurer vis-a-vis interest of worker's attorney, when insurer gave its consent to settlement. 77 P.S. §671.

2. Workers' Compensation 2251

Subrogation right of workers' compensation insurer to portion of proceeds received by injured worker from third-party tort-feasor took precedence over lien of attorney who represented worker in suit against third party. 77 P.S. §671.

Richard C. Angino, Harrisburg, for appellants (at 96) and appellees (at 139).

Dennis J. Bonetti, Harrisburg, for appellant (at 139) and appellee (at 96).

Before BECK, KELLY and HESTER, JJ.

BECK, Judge:

This case presents a question not previously addressed in our appellate case law. The issue is: Where an attorney for an injured employee who has been paid worker's compensation benefits negotiates a structured settlement on behalf of the injured employee in the employee's action against a third party tortfeasor, and the initial payment under the settlement is not sufficient to pay both the attorney's fee and the subrogation claim of the employer's compensation carrier under Section 319 of the Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §671 (Purdon 1989), is the attorney or the carrier entitled to first payment?

Section 319 states in pertinent part:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employe, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of the compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employe, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future instalments of compensation.

Pa.Stat. Ann. tit. 77, §671 (Purdon Supp. 1988).

The issue arises from the following facts and procedural history. On December 19, 1981, appellant Ronald Wolfe suffered injuries from a fall on the parking lot of Weis Markets. At the time of the injury, Wolfe was engaged in making a delivery for his employer, Allegheny Beverage Corporation. Allegheny's worker's compensation carrier, appellee/cross-appellant Pennsylvania Manufacturers' Association Insurance Company ("PMA"), soon began paying Wolfe compensation benefits.

On December 18, 1983, Wolfe instituted a personal injury action against Weis Markets, the alleged third party tortfeasor. Wolfe was represented in this action by co-appellant, the law firm of Angino & Rovner, P.C. ("Angino"). Angino and Wolfe executed a contingent fee agreement whereby Wolfe agreed to pay Angino a fee equal to forty percent (40%) of the amount recovered.

There is a factual dispute between the parties as to whether Angino also agreed to represent PMA's subrogation interest in the Wolfe personal injury suit. The parties exchanged various letters and otherwise communicated with each other both prior to institution of the personal injury suit and thereafter. PMA argues these communications form a contract between PMA and Angino pursuant to which Angino agreed to represent PMA's interest. Angino denies that such a contract was formed.

In April 1985, serious settlement negotiations between Weis Markets and Wolfe began. The result was an agreement that the case would be resolved via a structured settlement whereby the total value of the settlement would not be paid upfront, but rather spread out over a number of years. The structure envisioned an initial payment of $110,000 to Wolfe, which Wolfe orally agreed to pay Angino as full payment for Angino's contingent fee, plus monthly payments to Wolfe of $1,250 for life. Wolfe was also to receive sizeable lump sum payments every five years for the next twenty-five years.

PMA objected to this proposal on the ground that it did not provide a sufficient upfront payment to reimburse PMA for compensation it had already paid Wolfe as provided by Section 319 of the Workmen's Compensation Act. PMA also immediately retained separate counsel to protect its interests in this matter.

Weis Markets refused to consummate the settlement without PMA's approval, obviously fearing that it would be subject to an action by PMA if the settlement was unsatisfactory to it. In order to preserve the settlement, PMA and Angino agreed to hold their dispute over the priority of their respective claims in abeyance. PMA withdrew its objection to the settlement and a settlement agreement was executed between Weis Markets and Wolfe. This agreement began with the following recital:

> Plaintiffs and Defendants entered into an agreement whereby Defendants agreed to pay to Plaintiffs $110,000 in a lump sum and periodic payments of $1,250 per month for life (20 year guarantee) with additional periodic balloon payments at five (5) year intervals commencing in 1990 and continuing to 2010. Said settlement has a present value of approximately $274,000. Following said agreement Pennsylvania Manufacturers' Association (PMA) asserted a Worker's Compensation lien interest in the settlement. Plaintiffs contend that the $110,000 lump sum payment is to cover Plaintiffs' 40% attorney's fees contract and expenses. PMA contends that it has a legal right to half of the lump sum because of its Worker's Compensation lien. Being unable to resolve the issue existing between PMA and Plaintiffs, PMA, Plaintiffs and Defendant have agreed to escrow $55,000 of the $110,000 lump sum payment. Defendants are to be released from future litigation between PMA and Plaintiffs and from any future obligations in this regard.

The Settlement Agreement further recited that PMA would execute a release of the defendants in the Wolfe action and that defendants would then issue a check in the amount of $55,000 (one-half of the initial payment) jointly payable to PMA and appellants. The check was to be deposited in an

escrow account. Although PMA was not a signatory to this Agreement, the check was issued as the Agreement contemplated and it recited that it was tendered by defendants in final settlement of all claims.

PMA and Angino then executed an Escrow Agreement governing the escrow of the $55,000. The Escrow Agreement begins with numerous recitals providing the background giving rise to the escrow arrangement. These recitals set forth the identities of the various parties and the facts relating to Wolfe's injury and personal injury suit against Weis Markets. The recitals continue as follows:

> WHEREAS, a dispute has arisen between Angino and PMA as to PMA's entitlement to recover its subrogation interest from the initial lump sum payment of $110,000. It is PMA's position that it is entitled to recover the its [sic] subrogation interest from the initial lump sum payment to the extent of 60 percent of PMA's total workmen's compensation lien existing at the time of this Agreement and which would recognize a 40 percent attorney's fee payable to Angino for professional services rendered in connection with developing the settlement fund.
>
> WHEREAS, it is Angino's position that he is entitled to recover an attorney's fee of 40 percent of $275,000, plus expenses, or $115,000 from any initial lump sum payment. Accordingly, it is Angino's position that no money is available to PMA from the initial lump sum payment for PMA's workmen's compensation subrogation lien.
>
> WHEREAS, Angino and PMA desire to create a single, interest bearing account into which the sum of $55,000 would be deposited as a security to protect PMA's subrogation lien pending a judicial determination of the prior-

ity of various claims to the proceeds by the parties to the instant agreement.

The actual covenants of the Escrow Agreement provide only for the establishment of the escrow account, the appointment of the escrow agent, and the disposition of the account upon resolution of the dispute between PMA and Angino.

On September 20, 1985, PMA instituted suit against Wolfe and Angino in the court of common pleas. The complaint contains three counts. The first count pleads PMA's statutory subrogation lien and requests payment of the entire amount. Thus, Count I demands payment of more than the $55,000 of escrowed monies. This count pleads that Wolfe and Angino's conduct in refusing to honor PMA's subrogation interest entitles PMA not only to the amount that the Escrow Agreement recites as being PMA's claim, i.e., the total compensation benefits paid minus PMA's proportionate share of the attorney's fees incurred by Wolfe in settling the personal injury lawsuit, but rather to the full amount of benefits paid without deduction for any share of the fees, plus interest. The complaint alleges that this amount is $87,468.81, not including interest.[1]

Count II of the complaint sounds in contract and alleges that Angino agreed to represent PMA in connection with the

[1] On appeal, PMA concedes that it does bear responsibility for a proportionate share of Wolfe's attorney's fees in prosecuting the third party action. However, PMA contends that the total compensation paid is $93,700 and that PMA's share of fees is only $18,400, thus leaving PMA with a total subrogation claim of $75,280. This is over $20,000 more than the amount of the escrowed funds.

PMA Brief to this Court also contains a summary request for an award of its own attorney's fees and expenses in prosecuting this action. We may summarily dismiss this request by noting that PMA agreed to prosecute this action to resolve all outstanding issues between the parties and there is nothing in the record to indicate that in doing so PMA conditioned its agreement to litigate these issues on Wolfe or Angino paying PMA's fees and expenses. As we conclude *infra*, the instant dispute is limited to a dispute over disposition of the escrowed funds, plus interest.

Wolfe personal injury suit, failed to do so and is, therefore, liable for damages in the amount of all benefits PMA has paid to Wolfe, plus interest.

Count III sounds in tort, and alleges that Angino was negligent in failing to protect PMA's subrogation interest. It seeks the same damages as Counts I and II.

After discovery, both parties filed Motions for Summary Judgment. The trial court granted PMA's motion as to Count I, finding that PMA's statutory subrogation interest has priority over appellants' rights, but awarded PMA only the amount of the escrowed funds. The court refused to award PMA any further sums because of Wolfe/Angino's allegedly improper conduct in refusing to honor PMA's subrogation interest. The court also granted Wolfe/Angino's motion for summary judgment as to Counts II and III, refusing to award PMA any damages for breach of contract or negligence by Angino. In this regard, the court found that by entering into the Escrow Agreement, PMA had waived its right to claim any amounts in excess of the escrowed monies. In the trial court's words:

> That agreement was made for the specific purpose of obtaining a settlement in the Wolfe's [sic] negligence action, and it embodies the outer limits of the parties' rights and liabilities with respect to the priority of their claims.

Trial Court Opinion at 4.

Both parties appealed. We agree with the trial court's disposition and affirm.

[1] We begin, as did the trial court, with a consideration of Counts II and III of the complaint, as to which the trial court entered summary judgment against PMA, and with the trial court's determination that even as to PMA's subrogation lien, pled in Count I, PMA was limited to claiming the escrowed

funds alone, plus interest. As stated above, the trial court reasoned that PMA had waived its right to pursue any causes of action against Wolfe/Angino other than that based on its subrogation lien under Section 319. Moreover, even as to the subrogation lien, the trial court found that PMA had waived its right to pursue any funds in excess of the $55,000 in the escrow fund, plus interest.

This is unquestionably a proper resolution. PMA was confronted with a difficult situation when, on the eve of the trial of Wolfe's personal injury suit, it became clear that the structured settlement Weis was offering would not provide enough upfront monies to cover both Angino's fee and PMA's subrogation lien. PMA then hired separate counsel and considered its choices. It could either prevent the settlement by withholding its approval thereof, which Weis required, or it could agree to the settlement and resolve its dispute over its subrogation lien later. The first alternative was unsatisfactory. If the case was not settled, there was a good chance that a trial would yield a defense verdict. There would then be no fund from which PMA could collect its subrogation lien.

The second choice also had its disadvantages. If the case was settled, PMA would have to release Weis from any future claims and be left to proceed against Wolfe/Angino, with uncertain results. PMA chose the latter. In doing so, PMA made a conscious decision to forego its right to prevent the structured settlement and allow the Wolfe personal injury suit to go to trial, at which PMA could have asserted its subrogation lien. PMA chose instead to permit the settlement, avoid a risky trial, and to assert its subrogation lien only against Wolfe/Angino and only under those conditions that are set forth in the various agreements between the parties. These agreements reveal that the sole right PMA reserved was a right to protect its subrogation lien under Section 319. They also reveal that PMA expressly recognized that under Section 319, this lien is

limited to the amount of compensation benefits payable, minus PMA's proportionate share of the attorney's fees expended in obtaining the recovery against the third party tortfeasor. Both the Settlement Agreement and the Escrow Agreement are expressly premised on PMA's recognition that its rights in this matter are limited to its subrogation lien, and that the lien is calculated by subtracting PMA's share of attorney's fees from benefits payable, yielding in this case a subrogation lien valued at $55,000, i.e., the escrowed amount.

This premise, on which all parties depended in agreeing to allow the settlement to proceed and to have the dispute between PMA and Wolfe/Angino resolved separately, is contained in the recitals of both the Settlement Agreement and the Escrow Agreement, as quoted above. Both agreements recite that PMA's claim is its subrogation claim, that the value of the claim is sixty percent (60%) of the compensation already paid by PMA, and that the resolution of this claim and this claim alone would be pursued separately by PMA and Wolfe/Angino.

PMA would have us ignore these recitals and consider its agreement to escrow funds in a vacuum. This we cannot do, as our Supreme Court has specifically stated that:

> The recital of a fact upon the truth of which the execution of a contract is dependent and which, reflecting a joint attitude of mind, is made an integral and essential part of a contract, is conclusive in the absence of mistake sufficient to reform the contract.

Kefover v. Potter Title and Trust Co., 320 Pa. 51, 57, 181 A. 771 (1935). An exception to this general rule, not applicable to this case, arises where the recitals of background facts in the parties' agreements are in conflict with the operative provisions of the agreements and we are faced with resolving an ambiguity. In the instant case, the agreements clearly and uniformly express the understandings of the parties and the

background against which they were reached. We cannot ignore what the agreements unambiguously state.

Moreover, we have no doubt that Wolfe/Angino reasonably relied on PMA's expressed position that it would assert a claim only to the escrowed monies and only on the basis of its subrogation interest. They may well never have agreed to the structured settlement and escrow arrangement if they envisioned that PMA would later be permitted to reverse fields and assert a claim for the entire amount of compensation payable, thereby denying liability for any contribution toward attorney's fees, plus interest, costs and other relief, under theories ranging from professional negligence to breach of contract.

We, therefore, construe this case as did the trial court and find "the long and short of this entire litigation ... [to be] a legal question as to which party has priority to the sum of $55,000 which is now in escrow." Trial Court Opinion at 6-7.[2]

The trial court's grant of summary judgment in favor of Wolfe/Angino on Counts II and III of PMA's complaint is affirmed.

[2] We now turn to the resolution of the admittedly difficult question of which of the competing parties is entitled to first payment out of the initial lump sum payment from the structured settlement. We emphasize that this is a question of priority of payment and not of entitlement. Both parties clearly deserve to be paid. PMA had a duty to pay worker's compensation benefits to Wolfe and it fulfilled this duty. Its recom-

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[2] We also note that PMA's contract and tort claims are in a sense mooted by our disposition of their subrogation claim. By granting PMA relief on this claim, we effectively remove any damages they may have suffered as a result of Wolfe/Angino's conduct, except to the extent that PMA waived its right to further damages. Moreover, we have difficulty in seeing how PMA could prove that Wolfe/Angino's conduct was the cause of any damage to PMA under any circumstances. Since PMA retained new counsel before the Wolfe personal injury action was resolved, PMA was able to protect its interest fully before any damage to PMA could be done through a resolution of that action which did not take account of PMA's interest.

pense for such payments is its right to be subrogated to any recovery by Wolfe against a third party tortfeasor.[3] *Trumble [Trumbull] v. Paris Linen and Decorating Shops*, 95 Montgo. Co. R. 125, *aff'd mem.*, 249 Pa.Super. 629, 377 A.2d 1004 (1977), *allocatur denied* 11/10/77. On the other hand, there would be no fund from which to compensate PMA if it were not for the services of Angino in representing Wolfe in the third party action and in settling it. Thus, it would appear that the equities are in equipoise and our difficult task is to construe and apply the law, knowing that whatever the result, payment to one party will be delayed.[4]

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[3] Wolfe/Angino also attack PMA's subrogation claim on the independent ground that PMA cannot assert a subrogation claim where the third party tortfeasor action is resolved through a settlement as opposed to being tried to a verdict because a settlement does not establish the negligence of the third party as the cause of the employee's injuries. The trial court rejected this contention on the ground that it has recently been rejected in several appellate cases. *See Helms Express v. Workmen's Compensation Appeal Board (Lemonds)*, 106 Pa.Commw. 287, 525 A.2d 1269 (1987), appeal dismissed 10/88; *Heiser v. Workmen's Compensation Appeal Board*, 95 Pa.Commw. 350, 505 A.2d 1060 (1986); *Trumble* v. Paris Linen and Decorating Shops*, 95 Montg. Co.R. 125, aff'd mem., 249 Pa.Super. 629, 377 A.2d 1004 (1977), *allocatur denied* 11/10/77. The record reveals that this issue is also presently pending in a separate workmen's compensation administrative proceeding between these parties concerning PMA's right to future credit against compensation payable. The workmen's compensation referee presiding over that matter has already determined that PMA's subrogation claim is not invalid on the ground that the Wolfe personal injury was resolved through a settlement. The referee's decision has been appealed to the Workmen's Compensation Appeal Board. We find no error on this ground, but leave final determination of the question to the workmen's compensation authorities where it properly resides. We decide today only whether, assuming PMA has a valid subrogation claim, it preempts Wolfe/Angino's claim to the initial settlement payment. Should the workmen's compensation authorities later determine that PMA had no subrogation claim for any independent reason, obviously all of the initial payment will be due to Wolfe/Angino.

[4] We take some comfort from the fact that to a certain extent, the parties themselves created this difficult position. It is they who determined that they would not resolve the priorities question at the time of structuring the settlement or, alternatively, refuse to settle unless sufficient upfront monies were available for both. They determined that it was advisable to secure a settlement first, thereby avoiding the possibility of no fund for either to lay claim to, and then take their chances on priority of payment.

Determining who shall be paid first is a question of statutory construction. That is, where there is a structured settlement and some monies are paid at the outset, but the initial payment is not enough to cover the claims of both the attorney for the employee and a subrogated employer/carrier, does Section 319 contemplate that the injured employee's attorney shall be paid first out of those monies, or does it contemplate that the employer/carrier will be paid first? In actuality, this problem was probably never contemplated by the legislators in drafting Section 319. The section was last amended in 1972, well before the advent of structured settlements as a popular means of resolving disputes. Moreover, there is no Pennsylvania case specifically addressing this issue. Thus, we must glean the proper application of Section 319 to this issue from more general principles regarding the meaning of Section 319 and the policies that underlay it. Our review of these principles and policies convinces us that the subrogation right is primary and attaches immediately upon recovery or settlement by the employee with the third party.

An employer's right to be subrogated to the recovery of a compensated employee against a third party is an equitable right. *Workmen's Compensation Appeal Board v. Del Vecchio,* 23 Pa.Commw. 244, 351 A.2d 691, 693 (1976). As such, the purpose of providing the right is to achieve substantial justice between the parties. Since the employer has already paid benefits to the employee, when the employee recovers funds from another in compensation for the same injury, the employer is subrogated so that it is reimbursed for payments made and so that a double recovery by the employee is prevented. *Dale Manufacturing Co. v. Bressi,* 491 Pa. 493, 421 A.2d 653, 654 (1980). Section 319 expresses this right unequivocally, stating that the employer "shall" be subrogated to the right of the employee against the third party tortfeasor.

The Supreme Court has recently commented on the mandatory nature of the employer's subrogation right. In *Winfree v. Philadelphia Electric Co. & Allis-Chalmers Corp.*, 520 Pa. 392, 554 A.2d 485, 487 (1989), the court noted that the purpose of the act is to provide the employee with an exclusive right to benefits from his employer without proving fault. In exchange for this right, the act provides the employer who has paid such benefits a subrogation right. As the *Winfree* court stated, "The legislature could not have manifested more clearly its intent that the subrogation rights [sic] of the employer is absolute. ... as a general principle of law, the employer's subrogation rights are statutorily absolute and can be abrogated only by choice." *Id.*

The Supreme Court's most comprehensive statement in recent years concerning the proper application of Section 319 is found in *Rollins Outdoor Advertising v. Workmen's Compensation Appeal Board*, 506 Pa. 592, 487 A.2d 794 (1985). In *Rollins*, the employee had received $27,000 in compensation benefits. He sued a third party and received $67,000 in settlement proceeds. The settlement was not structured—the entire amount was paid in a lump sum. The employee then agreed with his employer's compensation carrier that it would accept $10,000 in full payment of its subrogation claim, in exchange for which the employee would forego all future rights to compensation. The Supreme Court held that this was an illegal agreement and proceeded to determine the respective rights of the parties to the proceeds of the settlement with the third party.

The *Rollins* court made two calculations. First, it calculated the carrier's credit for future compensation under the third sentence of Section 319 which provides that where the recovery of the employee against the third party exceeds the compensation already paid by the employer, the balance of

the recovery that the employee receives is a credit to the employer against future compensation payable. Then, the court calculated the carrier's liability to reimburse the employee for counsel fees and expenses incurred in prosecuting the third party action. This calculation was done in accordance with the second sentence of Section 319 which provides that a subrogated employer must give up out of its share of the recovery a proportionate amount of the attorney's fees and expenses that the employee incurred in prosecuting the third party action. The court's calculation of the future credit, or the "grace period" in which the carrier would be relieved of making future compensation payments to the extent that the third party recovery exceeded compensation already paid, begins with a deduction from the settlement proceeds of the employee's contingent fee payable to his attorney in the amount of $25,000. The court's equation deducts these fees *prior* to deducting the carrier's subrogation claim.

Wolfe/Angino argue that because the *Rollins* court made an initial deduction for fees, the *Rollins* opinion establishes that the attorney's right to payment is prior to the carrier's right to payment. We disagree. The *Rollins* opinion does not address the issue presented herein. Although the *Rollins* court's calculations do reflect a payment of attorney's fees from the settlement proceeds, and *then* reflect deduction of the subrogated amount, we do not regard this mathematical formula as having any relevance to the priority issue we decide today. In *Rollins*, the settlement proceeds paid at the time of settlement were more than sufficient to pay *both* the entire attorney's fees and the entire subrogation claim. The court's calculations were solely aimed at determining the future period in which, under the third sentence of Section 319, the carrier would be relieved of paying the employee benefits to the extent that the settlement proceeds exceeded the amount of compensation already paid. This method of calculating the grace period cannot be

construed as a holding that in all cases the attorney's fee is to be paid first, no matter what prejudice may result to the subrogated party's claim.

We also note that the *Rollins* court's actual discussion of the employer's subrogation right supports the position that the subrogation right is primary to the right of any other person to the fund, whether it be the employee himself or his attorney. After quoting Section 319, the court stated:

> Thus, the compensation paid by the employer to the date of the third party recovery constitutes a claim against the recovery, payable *immediately* upon recovery to the employer. Any recovery in excess of the compensation paid to the date of recovery constitutes an advance of future compensation payable.

Id. at 596, 487 A.2d at 796.

Further, the *Rollins* court commented that there was a substantial difference to the employer (or its carrier) between immediate reimbursement for compensation already paid and awaiting reimbursement by receiving a credit against future compensation payable. In *Rollins*, the employee had argued that it made no actual difference to the employer if it was not immediately reimbursed from the settlement proceeds for compensation already paid because the employer would ultimately be made whole by receiving a larger credit against future compensation payable. The Court responded that this assertion "ignores the value to an employer of receipt of the entire subrogation amount in a lump sum at the earliest possible time." *Id.* at 599, 487 A.2d at 797.

Thus, although we do not regard the *Rollins* opinion as having disposed of the issue presented here, we regard some of the Court's statements as actually supporting the right of the compensation carrier to immediate payment from the recov-

ery against the third party, prior to the claims of any other party thereto.

We also regard the precise language of Section 319 regarding the allocation of responsibility between employer and employee for attorney's fees and expenses in the third party action as supportive of the view that the carrier's subrogation claim is prior to the employee's attorney's fee claim. Section 319 in its present form dictates that the employer who has already paid benefits *shall* be subrogated to the right of the employee against the third party tortfeasor. Section 319 also recognizes the inequity of imposing the sole responsibility for payment of these fees on the employee since obtaining the recovery or settlement also benefits the subrogated employer. Accordingly, Section 319 states that the attorney's fees from the third party action shall be prorated so that the subrogated employer must pay that proportion of the fees that the amount of compensation paid or payable bears to the total recovery or settlement against the third party. This provision defines the employer's responsibility to give up a portion of its subrogation claim in order to contribute toward the employee's attorney's fee. The balance of the fees are the employee's responsibility.

Were we to hold that the attorney must be paid in full for his services before the subrogated employer can receive any payment on its subrogation claim where, as here, the initial payment under the settlement will be totally exhausted by the attorney's fees, we would be construing Section 319 in a manner contrary to its basic intent. We would effectively be forcing the employer not only to contribute the proportionate share of the fees that the statute requires the employer to pay, but also to forego the value of having its subrogation claim satisfied at the earliest possible time. By requiring the employer to await payment until future installments under the settlement are paid, we would be denying the employer the

use of that money until further settlement payments are made, despite Section 319's directive that the employer receive this money as reimbursement for benefits already paid. The attorney, on the other hand, would have been paid in full and the employee's obligation for his share of the fees satisfied in full. We do not read Section 319 as forcing a subrogated employer to "structure" repayment of its subrogation claim, while allowing the employee and his attorney to avoid structuring payment of the attorney's fee. Such a result would clearly undermine the intent underlying Section 319, which provides an "absolute" subrogation right to the employer in an attempt to do full justice between the parties.

By resolving this matter as we do, both parties receive a portion of the upfront settlement payment. Angino receives the proportion of his fee that the statute requires PMA to pay. PMA receives the amount in escrow. The balance of Angino's fee must be collected from future settlement payments and Wolfe will receive the balance of the settlement as it is due. We regard this as the most equitable solution and the one most consonant with the absolute subrogation right that Section 319 grants.

Thus, we affirm the trial court's judgment directing payment of the escrowed funds, plus accrued interest, to PMA in satisfaction of its subrogation claim for compensation benefits paid.

Pennsylvania Manufacturers' Association
Insurance Company v. Wolfe

Workers' compensation — Subrogation right of insurer — Workmen's Compensation Act — Attorney's contingent fee — Structured settlement of third-party action — Initial lump-sum payment inadequate to satisfy claims — Priority of insurer's subrogation claim

A workers' compensation carrier's right of subrogation under section 319 of the Workmen's Compensation Act, 77 P.S. §671, has priority over an attorney's contractual right to a contingency fee when an underlying third-party action is resolved on a structured basis and the initial lump-sum payment at the time of the settlement is insufficient to satisfy both claims.

Motion for summary judgment. C.P. of Dauphin County, no. 3233-S-1985.

Dennis J. Bonetti, for plaintiff.
Richard C. Angino, for defendants.

DOWLING, *J.*, January 21, 1988—This case of first impression involves a clash between an insurance carrier's right of subrogation under section 319 of the Pennsylvania Workmen's Compensation Act[1] and an attorney's contractual right to a contingency fee when the underlying third-party tort action is resolved on a structured basis and the front money at the time of settlement is insufficient to satisfy both claims.

The event which spawned this litigation occurred on December 19, 1981, when Ronald Wolfe, a defendant herein, was injured while making a delivery of soda on behalf of his employer, Allegheny Beverage Company, to Weis Markets in Lemoyne, Pa. As Mr. Wolfe was unloading a case of soda, he

[1] Act of June 2, 1915, P.L. 736, art 3, §319, as amended, 77 P.S. §671.

slipped on a patch of ice and fell to the ground, severely injuring his left knee. Plaintiff, Pennsylvania Manufacturers' Insurance Company began paying weekly disability benefits of $262 on December 27, 1981, and continued to pay that amount, plus medical expenses, until February 1986. To date, Mr. Wolfe has been unable to return to work.

On October 25, 1982, Mr. Wolfe and his wife Rose, engaged the law firm of Benjamin and Angino, P.C., (the predecessor of Angino and Rovner, hereafter Angino) to represent them in a negligence action against Weis Markets. A contingency fee agreement was signed in which Angino would be entitled to 40 percent of the recovery if suit was filed. On November 17, 1983, suit was filed after which settlement negotiations ensued. Meanwhile, PMA had given notice of its subrogation claim to Angino by letter dated November 1, 1982. Since that time PMA has persisted in enforcing its right to the full amount of the subrogation claim in the action between the Wolfes and Weis Markets. However, because PMA insisted on obtaining its full claim, Weis Markets and its carrier, Home Insurance Company, refused to enter into a settlement unless and until PMA agreed. Settlement negotiations centered around the now-popular "structured" settlement, which provides for an initial lump-sum payment, monthly payments and/or balloon payments. As is often the case, the lump-sum payment was to be equivalent to the attorney's fees based on the present value of the settlement.

To resolve their differences, PMA drafted an escrow agreement which Angino executed on June 25, 1985. In the agreement, the parties state their respective positions with regard to the priority of their claims and agree to litigate that issue in court. The sum of $55,000[2] was placed into an interest

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[2] The $55,000 figure was arrived at by rounding off PMA's then total lien of $87,468.81 to $90,000 and subtracting PMA's proportionate share of the attorney's fees (40 percent of $90,000 or $36,000) and expenses. This money is derived from the initial lump-sum payment; it is merely coincidental that it is exactly one-half of the lump-sum payment.

bearing escrow account with Richard Angino acting as escrow agent. That money and the accrued interest is to be distributed to the prevailing party in the instant action.

Thereafter, on August 2, 1985, the Wolfes and Weis Markets entered into a settlement agreement which provided for an initial lump-sun payment of $110,000, payments of $1,250.00 per month for life with a 20-year guarantee and additional balloon payments every five years of $10,000, $20,000, $30,000, $40,000 and $50,000, respectively. The parties agree in the escrow agreement that the present value of the settlement is $275,000. Thus, $110,000 represents Angino's 40 percent contingency fee.

PMA filed suit on September 20, 1985, against the above-captioned defendants alleging three counts for recovery of the full amount of the subrogation lien: (1) a statutory right based on section 319 of the act, (2) a contractual right based on an alleged attorney-client relationship between PMA and Angino, and (3) negligent legal representation. Present before the court are cross-motions[3] for summary judgment as to all three counts. As to counts two and three, we will grant defendants' motion for the reasons that follow.

PMA argues that an attorney-client relationship was created by virtue of an exchange of two letters between itself and Angino. We need not decide this issue because we hold that PMA waived its claims under counts two and three by entering into the escrow agreement of June 25, 1985. That agreement was made for the specific purpose of obtaining a settlement in the Wolfes negligence action, and it embodies the outer limits of the parties' rights and liabilities with respect to the priority of their claims. The agreement so states:

[3] By an apparent oversight, defendant's motion is not in the prothonotary's file, nor has it been entered on the docket. Nevertheless, the same legal arguments were advanced in their motion for judgment on the pleadings and in their brief in support of their motion for summary judgment. We therefore deem it filed.

"Whereas, a dispute has arisen between Angino and PMA as to PMA's entitlement to recover its subrogation lien from the initial lump-sum payment of $110,000. It is PMA's position that it is entitled to recover the its [sic] subrogation interest from the initial lump-sum payment to the extent of 60 percent of PMA's total workmen's compensation lien existing at the time of this Agreement and which would recognize a 40 percent attorney's fee payable to Angino for professional services rendered in connection with developing the settlement fund."

PMA mounts a two-fold attack on defendants' waiver theory. First, PMA argues that Angino failed to plead the defense as "new matter," and second, they are not bound by the above-quoted "whereas" clause because it is only a recital clause, and as such, it does not control the operative provisions of the agreement. We must reject these contentions. Although defendants did not expressly plead "waiver," the defense of the escrow agreement permeates their answer, new matter and counterclaim. The purpose of pleading is to provide notice of claims and defenses. Plaintiff was not surprised or led astray by defendants' theory, and, in fact, has countered this argument throughout this litigation.

PMA urges that the escrow agreement merely provided security for their lien and that it has no effect on counts two and three of the complaint. While it is true that the operative provisions of a contract control where there is an ambiguity, here there is no ambiguity between the operative provisions and the recital provisions. We must keep in mind that our function is to ascertain the intent of the parties, and we are not required to do so in a vacuum. The court may properly consider the nature and character of the transaction and the facts and circumstances which gave rise to its execution. *Walter v. Baldwin*, 126 Pa. Super. 589, 193 Atl. 146 (1937). Here, PMA

knew well that if it had not consented to the settlement, in all probability the Wolfes and Weis Markets would have proceeded to trial and that a defense verdict was quite possible. PMA would thus have recouped nothing on its lien. Consent to settlement was its only realistic alternative.

The recitals in the agreement do not contradict the operative provisions. Indeed, the operative provisions only govern the mechanics of how the funds are to be accounted for and distributed. It is the recitals, however, and the factual background of this litigation that provide the meaning to which this court must give effect. *Kefover v. Potter Title and Trust Company,* 320 Pa. 51, 181 Atl. 771 (1935).

Nowhere in the recitals does PMA allege or attempt to preserve its breach-of-contract claim. PMA, which drafted the agreement, was content to pursue the funds on the basis of its statutory entitlement. In fact, PMA recognized its obligation to pay its proportionate share of attorney's fees in accordance with the law. This is in direct contradiction with the complaint, which alleges that they do not owe them. To ignore the recitals would be to render their insertion an exercise in futility. The long and short of this entire litigation is a legal question as to which party has priority to the sum of $55,000 which is now in escrow. We now address that question.

Section 319 of the act provides in pertinent part as follows:

"Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the em-

ployer and employe, his personal representative, his estate or his dependents. The employer shall pay that portion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employe, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation." (footnote omitted).

Angino maintains that he has a first claim to the initial lump-sum payment which supersedes PMA's statutory right. We disagree. In *Rollins Outdoor Advertising v. W.C.A.B.*, 506 Pa. 592, 487 A.2d 794 (1985), in discussing an employer's accrued subrogation lien, the court declared unequivocally that compensation paid by the employer "constitutes a claim against the recovery, payable *immediately* upon recovery to the employer." Id. at 487 A.2d at 796 (emphasis added). Here, the lump-sum payment of $110,000 is insufficient to pay both claims. Thus, Angino argues that PMA must recoup its claim by suspending future compensation payments. This same argument was presented by the employe in Rollins and was rejected by the court:

"Secondly, it ignores the value to an employer of receipt of the entire subrogation amount in a lump sum at the earliest possible time. Lastly it ignores the possibility that, had the employee's disability terminated within six years of settlement, the employer would have lost his claim to the full, accrued subrogation amount." Id. at 487 A.2d at 797.

The only material difference between Rollins and the instant case is that in Rollins the employee received a lump-sum settlement; here the settlement is structured and the

only the attorney fees. Thus, the question of priorities was not presented. We note that in a lump-sum settlement, the priorities question will not arise because funds are immediately available to satisfy the lien. Here, the question is one of timing, i.e., *when* is the carrier entitled to recoup the lien.

We conclude that the reasoning of Rollins controls the instant case. To be sure, we recognize that were it not for counsel's efforts, PMA would recoup nothing. For their efforts, counsel is entitled to their fee. However, it must also be recognized that before Angino ever agreed to represent the Wolfes, PMA had an unflagging statutory obligation to pay benefits for any work-related injury. In return for this obligation, PMA has a statutory entitlement to a first claim on the settlement proceeds.[4]

It is important to stress that although the parties may characterize this case as a contest between the carrier and the employee's attorney, legally speaking, it is between the carrier and the employee. Section 671 so states, "[T]he employer shall be subrogated to the right of the *employee.* ..." (emphasis added). Indeed, in this situation, under the Federal Rules of Civil Procedure, the carrier is the real party in interest in the third-party action. *Lucas v. Durabond Products Co.*, 510 F.Supp. 999 (1981). Regardless of the arrangement between the employee and his counsel, the settlement obtained was and always is subject to the carrier's lien until paid.[5] How and when plaintiffs' attorney's fees are to be paid is a contractual matter within the province of the contracting parties. But this is not to say that they may circumvent the employer's claim which

[4] Accord, 101 C.J.S. §1042.

[5] Angino also argues that PMA must prove negligence on the part of Weis Markets in order to recover its lien. This argument has been twice rejected. *Trumbull v. Paris Linen & Decorating Shops Inc.*, 249 Pa.Super. 629, 377 A.2d 1004 (1977); *Heiser v. W.C.A.B.* (Westmoreland Cas. Co.)., 95 Pa. Commw. 350, 505 A.2d 1060 (1986). We note also that in Rollins, supra, the employee's recovery was by way of settlement, yet the employer was allowed subrogation.

within the province of the contracting parties. But this is not to say that they may circumvent the employer's claim which has a statutory basis. The carrier is out-of-pocket a certain sum of money, and they are legally entitled to reimbursement the moment the underlying action is settled. Under defendants' theory, not only would it ignore the time value of money which was recognized in Rollins, but it would also be contrary to the rationale for subrogation because there is no assurance that the carrier would recoup the total lien.

"That subrogation is an equitable right to compel the ultimate discharge of an obligation by the party who ought, in good conscience, to pay it, is a well settled tenet of Pennsylvania law." *Appeal of Miller*, 119 Pa. 620, 13 Atl. 504 (1888). As an equitable entitlement founded on principles of reason and justice, subrogation is to be given liberal application and construed to yield a reasonable result." *Heiser v. W.C.A.B.*, 95 Pa. Commw. 350, 505 A.2d 1060, 1063 (1986); quoting Takiff, J., *Trumball° v. Paris Linen & Decorating Shops Inc.*, Court of Common Pleas of Philadelphia County (No. 437 July Term 1977) affirmed per curiam, 249 Pa.Super. 629, 377 A.2d 1004 (1977).

Our ruling also comports with public policy. Not only does it ensure that the carrier is not penalized for the faults of others, but it also makes certain that it will recoup its lien, thus lowering insurance costs in the long run. It also fulfills a primary objective of subrogation, in that it assures that a double recovery by the employee will not occur. *Dale Manufacturing Co. v. Bressi*, 491 Pa. 493, 421 A.2d 653, 654 (1980). Lastly, under defendants' theory, Mr. Wolfe would in effect repay the carrier by not returning to work. No court should sanction a rule which creates such a deterrent to work.

Since PMA is entitled to immediate reimbursement of its lien, it must also pay the proportionate share of attorney's fees

and expenses incurred in obtaining the recovery. Section 319, supra. Here, Angino charged a 40 percent contingency fee. Thus, PMA's lien must be reduced by 40 percent.

PMA argues that the lien is $93,682 by virtue of a finding by Referee Deeley of the Bureau of Workers' Compensation, dated October 16, 1986. Angino admits that the lien is at least $87,000 (see deposition of Richard C. Angino), but contends that he is not bound by the referee's finding because it was not formally enumerated as a "finding of fact" and in any event, collateral estoppel does not apply between tribunals of differing subject-matter jurisdiction and because he was not a party before the referee. Again, we must disagree.

Although Referee Deeley did not include this in his findings, there can be no doubt that he found it as a fact. In a separate paragraph of his "discussion of findings and conclusions," Deeley states, "Defendants have paid $93,682.81 in compensation to date with $56,666.85 of that being weekly payments and the remainder medical payments." We thus reject defendants' technical argument. Moreover, the computer printout of the payments made to Mr. Wolfe which were submitted at the hearing and in exhibit D of plaintiff's statement of material facts has not been challenged in any way.

Collateral estoppel must be given effect where the party against whom it is asserted had a "full and fair opportunity to litigate the issue in question." *Estate of Ellis III,* 460 Pa. 281, 287, 333 A.2d 728 (1975). Mr. Wolfe was obviously a party in the proceedings before the referee. Additionally, an associate from Angino's office was present. Thus, both defendants had an opportunity to dispute the amount of the lien, which was one of the principal issues. The argument concerning subject-matter jurisdiction is erroneous because the referee's jurisdiction was plenary with respect to the amount of the lien.

PMA is entitled to 60 percent of its total lien of $93,682.81 or $56,209.69. However, because the parties agreed to litigate only the sum of $55,000 and accrued interest which is not in escrow, judgment is granted in favor of PMA as to the escrowed funds. We note that in a normal case, PMA's lien would be further reduced by a proportionate share of the expenses incurred in obtaining the recovery.

Accordingly, we enter the following

ORDER

And now, this January 21, 1988, defendants' motion for summary judgment as to counts two and three of plaintiff's complaint is granted; plaintiff's motion for summary judgment as to count one is granted; and defendants are directed to release the amount in escrow to PMA.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND DISEASE COMPENSATION
HARRISBURG, PA 17120

NOTICE OF COMPENSATION PAYABLE

161-34-1508
SOCIAL SECURITY NUMBER

W5081-5027
EMPLOYER/INSURER CLAIM NUMBER

January 13, 1982
DATE OF THIS NOTICE

This Notice is to be sent to injured employe with the first payment of compensation and a copy filed with Department of Labor and Industry.

Injured Employe: Ronald B. Wolfe
Address: 431 Valley Street, Marysville, PA 17053
Employer: Allegheny Beverage Corp.
Address: 2501 Sycamore Street, Harrisburg, PA 17111
Nature of Injury: hemathrosis left knee

Check if injury is: (1) Permanent loss under 306(c) _____
(2) Eye injury _____
(3) Radiation injury _____

Compensation payable as follows:

1. Weekly disability rate $262.00
Check applicable: __XX__ Maximum allowable ($492.70)
_____ Below maximum based on average weekly wage of
$ _____*

*A complete wage statement in accordance with Section 309 must be attached to this Notice if rate below maximum.

2. Payments begin on 12-27-81 for injury which occurred on 12-19-81 (Compensation is not payable for first 7 days of disability unless disability exceeds 13 days.)

3. Payments will hereafter be made: _____ Weekly __XX__ Biweekly _____ Other (Special) _____ until employe returns to work without loss of income or disability otherwise ceases or changes in effect; HOWEVER, any termination or modification of these payments must be by agreement or final receipt, order of department referee or Workmen's Compensation Board, or as otherwise provided in rules and regulations of the Department, or as limited under Section 306(c) for amputation or other specific loss thereunder.

4. If injury involves loss under Section 306(c) and employe has returned to work, complete the following information:

(a) Compensation is payable for_____weeks for loss of _____

(b) Employe returned to work without loss of income on _____

(c) Healing period payable for _____ weeks (Up to (b) above and subject to 7-day waiting period)

(d) Total (a) and (c), payable _____ weeks

5. Remarks _____

_____

NOTICE TO EMPLOYE: If any questions arise involving these payments, contact representative named at bottom of this Notice. If you cannot resolve any problem with em-

ployer representative, you may call the Bureau toll free at 800-932-05°

Pennsylvania Manufacturers' Association
Insurance Company
P.O. Box 311
Lemoyne, Penna. 17043

Employer/Insurer: PMA Insurance Co. 031-3
Representative: Jon Kirssin
Phone Number: 763-7281

DC-495

ESCROW AGREEMENT

Agreement made this 25th of June, 1985, by Richard C. Angino, Esquire (hereinafter referred to as "Angino") and Pennsylvania Manufacturers Association Insurance Company (hereinafter referred to as "PMA").

WHEREAS, Ronald B. Wolfe (hereinafter referred to "Wolfe") instituted an action in the Court of Common Pleas of Cumberland County, docketed to number 3471 Civil 1983 on November 18, 1983 against Weis Markets for personal injuries allegedly suffered in connection with his duties while employed by Allegheny Beverage Corporation (hereinafter referred to as "Allegheny") and while making a delivery at Weis Markets in Lemoyne, Pennsylvania.

WHEREAS, PMA was the workmen's compensation insurance carrier for Weis at the time of the incidents giving rise to the action referred to in the preceeding* paragraph.

WHEREAS, as a result of injuries allegedly suffered by Wolfe, as referred to above, PMA was obligated under Pennsylvania Workmen's Compensation Act to make various payments to Wolfe and various health care providers as a result of his injuries.

WHEREAS, in an effort to resolve the action brought by Wolfe against Weis, Angino, on behalf of Wolfe, reached an agreement with Weis and its insurance carrier for a structured settlement with a present value of $275,000 and that provides for, *inter alia*, an initial payment to Wolfe of $110,000 at the signing of the agreement.

WHEREAS, PMA has a subrogation claim and interest, pursuant to the Pennsylvania Workmen's Compensation Act, against Weis Markets and to any recovery by Wolfe as a result of this third party action against Weis.

WHEREAS, a dispute has arisen between Angino and PMA as to PMA's entitlement to recover its subrogation lien from the initial lump sum payment of $110,000. It is PMA's position that it is entitled to recover the° its subrogation interest from the initial lump sum payment to the extent of 60 percent of PMA's total workmen's compensation lien existing at the time of this Agreement and which would recognize a 40 percent attorney's fee payable to Angino for professional services rendered in connection with developing the settlement fund.

WHEREAS, it is Angino's position that he is entitled to recover an attorney's fee of 40 percent of $275,000, plus expenses, or $115,000 from any initial lump sum payment. Accordingly, it is Angino's position that no money is available to PMA from the initial lump sum payment for PMA's workmen's compensation subrogation lien.

WHEREAS Angino and PMA desire to create a single, interest bearing escrow account into which the sum of $55,000 would be deposited as a security to protect PMA's subrogation lien pending a judicial determination of the priority of various claims to the proceeds by the parties to the instant agreement.

WHEREAS, Angino is willing to create and maintain a single, interest bearing escrow account into which the said $55,000 would be placed pending the outcome of the aforementioned action.

NOW THEREFORE, the parties hereto, intending to be legally bound hereby agree as follows:

1. Angino will deposit the sum of $55,000 from the initial payment of $110,000 of structured settlement proceeds referred to in the instant agreement, into an interest bearing escrow account immediately upon receipt of funds from Weis or its insurance carrier. Angino acknowledges and accepts the fiduciary responsibilities attendant to the establishment of said

escrow account and agrees that said monies so deposited will be paid out of said funds only in accordance with this agreement.

2. All interest received and any increment thereon shall be added to the funds so deposited and shall be paid and distributed along with the deposited funds to the party that prevails in the action that will be instituted to resolve the dispute set forth in the instant agreement. In the event that a final determination should require that the fund be divided by the parties, the interest shall be paid in pro ratio proportions to such division of said fund.

3. Angino will acknowledge the deposit of proceeds made into the interest bearing escrow account by giving PMA written receipt therefore that identifies the date, location, and source of the proceeds deposited.

4. Angino shall, on a quarterly basis, present an accounting of said fund showing interest earned to PMA.

5. Angino shall pay the total amount in said escrow account to the party who prevails in the action to be instituted, within 10 days of such final determination by a Court of competent jurisdiction or by agreement between the parties in accordance with the said agreement or Court Order or Judgment.

6. The provisions of this agreement shall be binding upon, inure to the benefit of and be enforceable by the parties hereto and their respective successors and assigns.

7. This agreement shall be governed by the laws of the Commonwealth of Pennsylvania.

IN WITNESS WHEREOF the parties hereto have duly executed this agreement as of the day and year above written.

/s/ Richard C. Angino
Richard C. Angino, Esq.
Escrow Agent

THE PMA GROUP

By _____

Distribution Sheet

LAW OFFICES
ANTINO & ROVNER, P.C.
4503 NORTH FRONT STREET
HARRISBURG, PENNA. 17110-1799
(717) 238-6791

RICHARD C. ANGINO
NEIL J. ROVNER
JOSEPH M. MELILLO
TERRY S. HYMAN
DAVID L. LUTZ
MICHAEL E. KOSIK
PAMELA G. SHUMAN
SOLOMON HURWITZ
(1928-1949)
HURWITZ, KLEIN, MEYERS & BENJAMIN
(1949-1967)
HURWITZ, KLEIN, BENJAMIN & ANGINO
(1967-1978)
BENJAMIN & ANGINO, P.C.
(1978-1983)

COUNSEL
IRWIN BENJAMIN
MACEY E. KLEIN

RONALD B. WOLFE and ROSE WOLFE

versus

WEIS MARKETS and SEAL-MASTERS, INC.

Distribution Sheet

TOTAL AMOUNT OF SETTLEMENT — LUMP SUM AND LIFETIME PAYOUT — PRESENT VALUE	$274,000.00

Distribution Sheet

DEDUCTIONS:	
Attorney's Fee (40% of $274,000)	$109,600.00
Attorney's Expenses	1,823.90
TOTAL DEDUCTIONS	$111,423.90
Less Fee Concession	1,423.90
ATTORNEY'S FEE AND EXPENSES — LUMP SUM UP FRONT PAYMENT FROM DEFENDANT	$110,000.00
BALANCE TO CLIENT: LIFETIME PAYOUT TO CLIENT (SEE ATTACHED CERTIFICATION OF ANNUITY CONTRACT) PRESENT VALUE	$174,000.00

AND NOW, this 2nd day of August, 1985, we acknowledge that we have read, understood, approved and obtained a copy of this Distribution Sheet.

WITNESS:

/s/Joseph M. Melillo

/s/Ronald B. Wolfe
Ronald B. Wolfe

/s/ Joseph M. Melillo

/s/Rose Wolfe
Rose Wolfe

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into this 2 day of August, 1985 between Plaintiff, Ronald B. Wolfe and Rose Wolfe, and the defendants, Weis Markets, Inc. and Seal-Master Industrial Products, Inc.

Plaintiffs and Defendants entered into an agreement whereby Defendants agreed to pay to Plaintiffs $110,000 in a lump sum and periodic payments of $1,250 per month for life (20 year guarantee) with additional periodic balloon payments at five (5) year intervals commencing in 1990 and continuing to 2010. Said settlement has a present value of approximately $274,000. Following said agreement Pennsylvania Manufacturers Association (PMA) asserted a Worker's Compensation lien interest in the settlement. [Plaintiffs contend that the $110,000 lump sum payment is to cover Plaintiffs' 40% attorney's fees contract and expenses. PMA contends that it has a legal right to half of the lump sum because of its Worker's Compensation lien. Being unable to resolve the issue existing between PMA and Plaintiffs, PMA, Plaintiffs and Defendant have agreed to escrow $55,000 of the $110,000 lump sum payment.] Defendants are to be released from future litigation between PMA and Plaintiffs and from any future obligation in this regard.

IT IS AGREED that in consideration of the full discharge of past, present and future claims arising out of the allegation set forth in Plaintiffs' Complaint, Cumberland County Court action No. 3471 Civil 1983, and in further full and complete discharge of any and all claims that could be asserted in the future by said Plaintiffs, Ronald B. Wolfe and Rose Wolfe, or their heirs, as a result of the alleged actions or omissions of the Defendant, the Defendant, Weis Markets, Inc., agree to pay the sums hereinafter specified. This release shall apply to all claims, whether known or unknown, on the part of the Plain-

tiffs, to the effect that this Agreement shall be a full, binding and complete settlement of any and all of Plaintiffs' claims of whatever kind or nature against Weis Markets, Inc., and Seal-Master Industrial Products, Inc., their agents or employees.

Defendant, Weis Markets, Inc., through their insurers hereby agrees to pay to the Plaintiffs, Ronald B. Wolfe and Rose Wolfe, and his attorney as follows:

TO THE PLAINTIFFS, Ronald B. Wolfe and Rose Wolfe:

1. The Defendant, Weis Markets, Inc., shall arrange for payment of the sum of Twelve Hundred Fifty and no/100 Dollars (1,250.00) per month to be made to said Plaintiff, Ronald B. Wolfe.

Said monthly payments shall begin as of June 20, 1985 and shall remain the same amount for such subsequent payment, with all future monthly payments pursuant to this Settlement Agreement continuing thereafter, payable each and every month throughout the lifetime of Ronald B. Wolfe with a 20-year guarantee.

In the event of the death of Ronald B. Wolfe prior to the expiration of twenty (20) years, the payments in the amounts heretofore set forth and on the dates hereinabove mentioned, shall continue to Rose Wolfe, said payments to continue for a period of twenty (20) years from the date of the initial monthly payment.

2. Defendant, Weis Markets, Inc. and their insurers shall pay to Joseph Melillo, Esquire and Ronald B. Wolfe and Rose Wolfe, the sum of Fifty-Five Thousand and no/100 Dollars ($55,000.00) within thirty (30) days of the execution and filing of a Dismissal with Prejudice as to all Defendants.

3. The Defendant, Weis Markets, Inc., and their insurers shall pay to Joseph Melillo, Esquire, as attorney for Ronald B. Wolfe and Charles E. Wasilefski, Esquire, as attorney for PMA Insurance Company, the sum of Fifty-Five Thousand and no/100 Dollars ($55,000.00) to be deposited in a trust account

to cover a pending subrogation claim by PMA as Plaintiff's Workmen's Compensation carrier. Said sum will be paid within thirty (30) days of the execution of this Settlement Agreement, execution of all Release forms submitted by Defendants, execution and filing of a Dismissal with Prejudice as to all Defendants, and the execution of a release by PMA of any and all claims against any party other than the Plaintiff.

4. The Defendant, Weis Markets, Inc., further agrees to provide for guaranteed payments to Ronald B. and Rose Wolfe, or their heirs, as follows:

On May 20, 1990	$10,000.00
On May 20, 1995	$20,000.00
On May 20, 2000	$30,000.00
On May 20, 2005	$40,000.00
On May 20, 2010	$50,000.00

5. Plaintiff, Ronald B. Wolfe and Rose Wolfe, shall execute any and [sic] Releases prepared by Defendants' attorneys which are not inconsistent with the basic term of this Agreement, including dismissals with prejudice of the aforedescribed action.

6. All parties agree to execute any and all supplementary documents and to take all supplementary steps to give full force and effect to the basic terms and intent of this Agreement.

/s/Ronald Wolfe
Ronald Wolfe

/s/Rose Wolfe
Rose Wolfe

Weis Markets, Inc.

Seal-Masters, Inc.

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* Errata in original.